

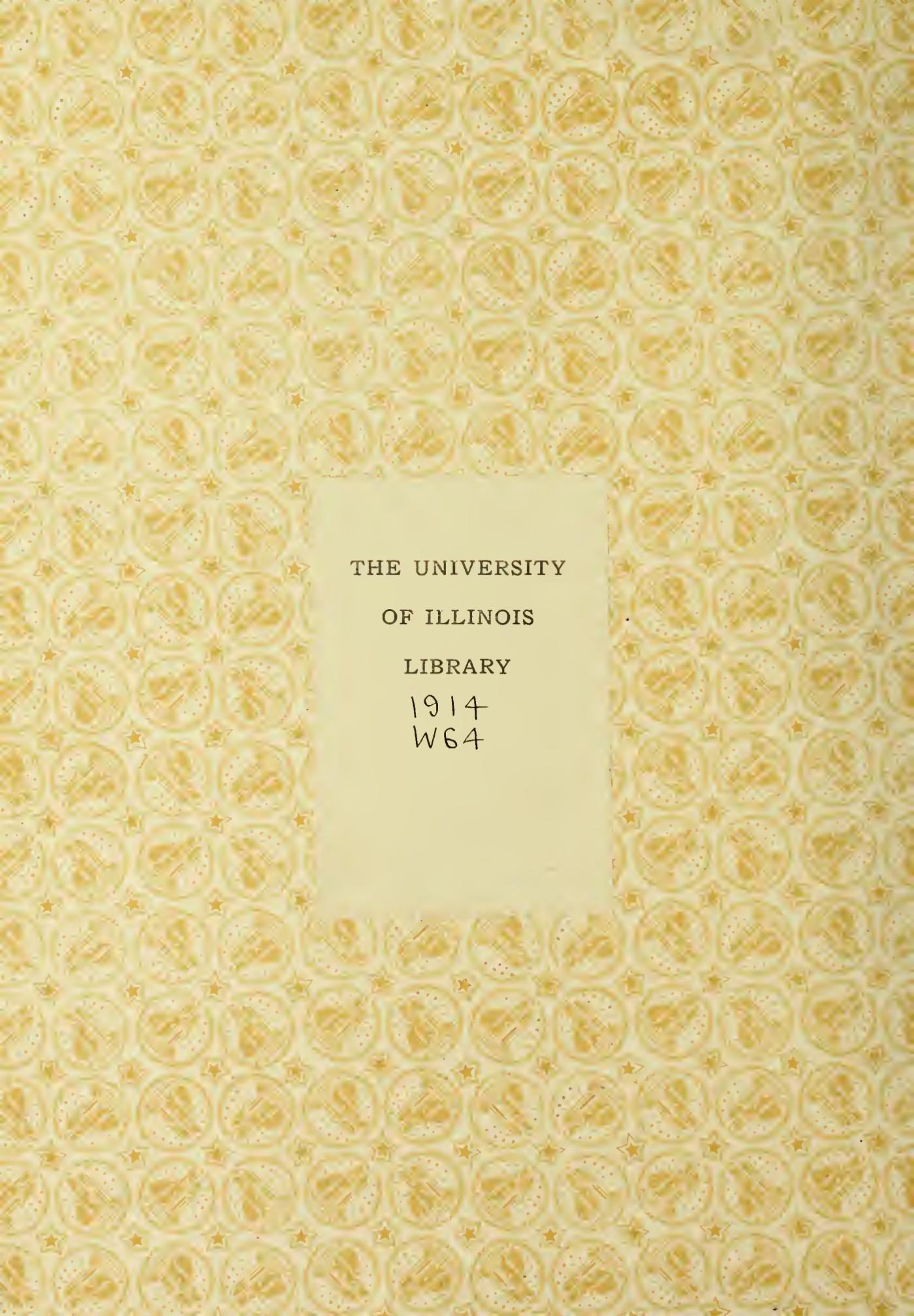
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**A History of Municipal Home Rule
in the State of Ohio**

Political Science

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A HISTORY OF MUNICIPAL HOME RULE
IN THE STATE OF OHIO

BY

ALLEN SAGE WILBER
A. B. University of Kansas, 1913

THESIS

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Allen Sage Wilber

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John A. Fairlie

In Charge of Major Work

James W. Garner

Head of Department


Recommendation concurred in:

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Introduction .

The early American municipality, like the English, was assigned a very narrow sphere in the governmental system, and the doctrine of delegated powers strictly interpreted by the courts, the growing interference of a centralized administration in local affairs, and legislative disregard of local autonomy have combined to maintain this subservient position.

A certain sphere of independence was nevertheless guaranteed in the early constitutions and laws of incorporation, while special laws were used to supplement the powers granted. With the growth in the importance of municipal government, further checks upon state aggression became desirable. Special laws were forbidden in some states; independence in specific matters of local government was granted in later constitutions, while in a few cases, special legislation and local autonomy were harmonized by the provision for a
(I)
local veto.

The failure of some of these guarantees to bring the desired results, and a growing realization that, whether successful or not, they were predicated upon a wrong theory, led to the adoption of a new mode of procedure in the last quarter of the nineteenth century. The essential feature of this new movement was the broad grant by the state to the city of more or less complete powers of local self-government, or, to use the term adopted, Municipal Home Rule.

(2)
In the Missouri constitution of 1875, was inserted the provision that "any city having a population of more than 100,000 inhabi-

(1) A general discussion is presented in Goodnow, Municipal Home Rule.

(2) A resume of Home Rule provisions down to 1909 is given in Margaret A. Schaffner's Municipal Home Rule Charters.

tants may frame a charter for its own government, consistent with and subject to the constitution and laws of this state"⁽¹⁾. At the time St. Louis was the only city having the specified population, but before 1900, Kansas City and St. Joseph had come within the operation of the provision. In the meantime, the movement had spread to other states.

In 1879, California gave a similar privilege to San Francisco, but with the important difference that charters should be subject to rejection as a whole by the state legislature. By successive amendments, this provision has been extended until today all cities with a population over 3,500 may frame and amend their own charters, special arrangements being made for cases where a city and county have been merged.⁽²⁾

Washington, in 1889, granted this power to cities of 20,000 or more population;⁽³⁾ Minnesota followed in 1896, with a provision applicable to "any city or village", the charters to be drafted not by an elected commission as in the earlier Home Rule measures, but by a permanently constituted body appointed by the district judges.⁽⁴⁾

Since 1900, the spread of Home Rule has been rapid. Varying provisions were adopted by Colorado in 1902, Oregon in 1906, Oklahoma in 1907, Michigan in 1908, Nebraska in 1911, Texas and Ohio in 1912, and Virginia to a limited extent in the same year.⁽⁵⁾ In Wisconsin, an amendment is now pending.

(1) Const. 1875, art. 9, sec. 16, 17, and 20-25 as amended in 1902.

(2) Const. 1879, art. 2, sec. 8, as amended in 1887, '90, '92, 1902, '06, and art. 2, sec. 6 as amended in 1896.

(3) Const. 1889, art. 2, sec. 10.

(4) Const. amendment, 1896, art. 4, sec. 36.

(5) Colo. Const. Amendment 1902, art. 20, sec. 4, 5; Oregon, Const. Amend. 1906 art. 2, sec. 2; Oklahoma, Const. 1907, art. 18, sec. 3(a); Michigan, Const. 1908, art. 4, sec. 36; Nebraska, Const. Amend. 1911, art. , sec. ; Texas, Const. Amend. 1912, art. 2 sec. 5; Ohio, Const. Amend. 1912, art. 18, sec. 1-14; Virginia, Const. Amend. 1912

The term "Home Rule" has reference specifically to the regime established by these constitutional changes. Home Rule, however, is not an absolute term. Its essence is local self-government, and this, as has been pointed out, has existed in at least a rudimentary state from the beginnings of municipal government. It implies local autonomy, which may be strictly defined and protected in a constitution, or which may be obtained in the absence of this legal guarantee, through the practical operation of the state governmental machinery.

In this broad sense, Home Rule was not suddenly thrust upon Ohio municipalities in 1912. The constitutional amendment of that year merely expanded the meaning of local self-government in Ohio beyond any that it had had in the past. Accordingly, this study does not begin with the convention of 1912, but goes back a hundred years to the early conditions of village government, attempting to trace the changing relations of state and municipality and the effect thereof on the degree of self-government enjoyed by the latter.

Chapter I

State Control of Municipalities through Special and Classified Legislation.

Early Municipal Development.

The thirty-five delegates who framed the first Ohio constitution in 1802 were dominated by an anti-federal sentiment. For fifteen years the government established by the ordinance of 1787 had been characterized by centralized authority, a lack of separation of powers, and the autocratic rule of a governor who frankly distrusted popular government. The nation-wide reaction against such a system, which had just effected the overthrow of the Federalist party, found expression in the work of this convention "It was dominantly and arbitrarily democratic." ⁽¹⁾ Protection of the individual was the underlying motive of the framers of the constitution, and since the legislature was to be trusted towards this end more than the executive, it was vested with the controlling power.

Little need was felt for restricting the power of the state government over local divisions. Municipal development had not begun. Cincinnati, the largest of the Ohio towns, consisted, about this time, of fifty-three log cabins, one hundred and nine frame buildings, and ten brick or stone houses, with a population of less than two thousand. Cleveland, eight years later, was a struggling village of three hundred. The economic interests of the state were primarily agrarian. It is not surprising then that no need was felt of limiting the power of the legislature to incorporate for all purposes. ⁽²⁾ Local self-government was protected, however, by the guarantee to counties, towns,

(1) Randall and Ryan, History of Ohio; vol. 3, ch. 4, p. 125. See also Patterson, The Constitution of Ohio and Allied Documents, Introd.

(2) See Constitution of Ohio, 1802; art. 8, sect. 27.

(2) (1)

and townships, of the right to elect all local officers.

Immediately following the launching of the new state, there began a rapid economic development which demanded from the legislature an increasing use of its power to incorporate by special act. These new corporations were, for the most part, banks, lotteries, turnpikes, toll-roads, canals, and later, railroads. Municipal incorporation began slowly in 1805 with Lancaster, Dayton, and Steubenville; before 1811 St. Clairsville, Springfield, Hamilton, and Lebanon had received charters by special acts; Cincinnati followed in 1819; and by the end of the first quarter of the century, this class of legislation was swelling the already large volume of special acts to tremendous proportions. That these acts of incorporation absorbed most of the time and attention of the general assembly is indicated by the record of the year 1833, when it passed two hundred and fifty local laws and thirty general laws. In the session of 1849-'50, five hundred and forty-five local and special acts were passed, of which seventy-three related to municipalities. In the next session the record of wholesale legislation was raised to six hundred and seventy-two such acts, filling seven hundred and nine pages of the Laws of Ohio. (2) The evident waste in time and money entailed in such a system soon created a strong sentiment for a change in the constitution, and to this was added a growing suspicion and dislike of all corporations, engendered by the over-development and consequent failure of business in many lines. A change in the relation of the state to the corporation was demanded by a wide-spread public opinion. This demand operated as an important factor in the movement for a constitutional convention. (3)

(1) Ibid; Art. 6, sections 1 and 3.

(2) Wilcox, Municipal Government in Michigan and Ohio, ch. 4.

(3) Ryan, Ohio Centennial Celebration, 1903; p. 25 and Randall and Ryan, History; vol. 3, 117. Mr. Ryan finds the strongest motive for the convention the desire for elective judges and other officers.

The most influential leader in this movement was Mr. Samuel Redary of Columbus, editor of the "Ohio Statesman" and of a special publication, "The New Constitution", which he devoted to agitation for a convention. In this he presented six arguments for a new constitution, one of which was that the power to incorporate should be confined to operation through general laws.

(1)

Constitutional Convention of 1851-2.

In the debates of the second constitutional convention, a strong feeling against corporations was expressed. "Corporations", said Mr. Beech of Guernsey, "are destructive to equality, and hostile to free institutions, and their existence should not be tolerated in a republican government." The attitude of the convention as a whole was better voiced by Mr. Morris, chairman of the committee on corporations other than banking. He said, "Three-fourths of the legislation for several years past has been responsive to the petitions of men coming up, asking to be associated for certain specific purposes, with certain powers guaranteed to them. Why not do all this under a general law? We would then get rid of this harassing of the legislature and would hasten the transaction of legislative business."

(2)

The opinion favoring general laws for incorporation prevailed, and three clauses to this effect were placed in the new constitution.

Article 13, section 1; The legislature shall pass no special act conferring corporate powers.

section 6; It shall be the duty of the legislature to provide for the organization of cities and incorporated villages by general laws, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power.

(1) Randall and Ryan, History, vol. 4, p. 99.

(2) Debates of the Ohio Constitutional Convention, 1851, p. 340.

Article 2, section 26; All laws of a general nature shall have a uniform operation throughout the state.

The purpose of the framers was well expressed by Judge Scott of the supreme court. (1) The system of special legislation, he said, "naturally led to improvident legislation, enacted by the votes of legislators who were indifferent in the premises, because their own immediate constituents were not to be affected by it. To arrest, and for the future prevent this evil, this provision was inserted in the present constitution." In another case, Judge Ranney said, "It was intended to correct an existing evil, and to inaugurate the policy of placing all corporations of the same kind upon a perfect equality as to all future grants of power: of making such laws applicable to all parts of the state, and thereby securing the vigilance and attention of its whole representation: and finally of making all judicial constructions of their powers, or the restrictions imposed upon them, equally applicable to all corporations of the same class." (2)

That this prohibition of special legislation applied to municipal incorporation was made clear by the action of the convention. It was proposed to amend article 13, section 1, by adding the words "except for municipal purposes and where, in their judgment the objects can be better obtained than under general laws". Such exceptions to the general rule had been made in the constitutions of New York, Wisconsin, Iowa, and California, but the proposal met defeat in the Ohio convention by a vote of 50 to 30, and similar amendments, intended to permit incorporation of municipalities by special acts were defeated on two other occasions. (3)

(1) 15 Ohio State Reports, 573.

(2) 15 Ohio State Reports, 21.

(3) Debates, pp. 355-362, 447.

Following the adoption of the constitution, a general municipal corporations act, the first of its kind, was passed in 1852. Under this code, municipal corporations were divided into four classes, and general laws were applied to each class. The constitutionality of this action was not questioned. Indeed the framers had anticipated such a division and considered it within the sanction of article thirteen, section one. Mr. Norris of Clermont, chairman of the committee which drafted that provision, had said before the convention, "the committee believed that all the corporations of the state could be as well regulated by general as by special acts of incorporation-- by some classification of cities -- by the number of inhabitants, or by some other manner which might be thought prudent"; and Mr. Hawkins of Morgan had declared that "a law might be made applicable for all the purposes of a charter for cities and towns of every class".(3)

The classes established by the code were; (a) cities over twenty-thousand, (b) cities from five to twenty-thousand, (c) incorporated villages, (d) and villages incorporated for general purposes. Cincinnati at the time was the only city in class one, so that the effect of the code was to permit legislation for a single city under the guise of a general law. Cleveland joined Cincinnati in 1853, leaving Columbus, Dayton, and Springfield in the second class.

While this first legislation did not violate the evident purpose of the constitutional provisions, other laws which were passed almost immediately, did do so, by extending the process of classification, and limiting the application to cities within a narrow range of population. In the first seventeen years, one hundred and eighty-four

(1) 52 Ohio Laws, 223.

(2) Debates (1851-2), vol. I, p. 340

(3) Ibid, vol. I, p. 347.

(6)

such acts were passed, and the classification was upheld by the courts.

(1)

In *Walker v Potter*, the supreme court declared that an act applying to cities of the first class, with a population of less than one hundred thousand, was of uniform operation although it might affect only one city. This principle was most broadly stated in *McGill v State*,
(2)
where the court held that "Under the power to organize cities and villages, the general assembly is authorized to classify municipal corporations, and an act relating to any such class may be one of a general nature".

While judicial interpretation was thus modifying the constitutional limitations, a growing sentiment evidenced itself in favor of their partial repeal. In 1857 there was submitted to popular vote a constitutional amendment which proposed to allow the legislature to make "special provisions in regard to corporations in cases where from their peculiar location or interests, such special provisions are required". The measure was defeated, but the electoral returns indicated a strong majority in its favor among those who expressed an opinion. Of a total of 332,126 votes cast, 123,229 supported it, and 35,973
(3)
opposed.

Extension of Classification.

(4)

In the second municipal code, of 1869, the division of cities and villages into two classes each was retained, with the evident purpose

(1) 18 Ohio State Reports 85 (1868).

(2) 34 Ohio State Reports 270 (1877). See also,--

State v Brewster, 39 O.S. 653. (1864)

State v Powers, 38 O.S. 54 (1862).

Bronson v Oberlin, 41 O.S. 476 (1864).

State v Fugh, 43 O.S. 98 (1885)

State v Hudson, 44 O.S. 137 (1886).

(3) Patterson, Constitutions of Ohio, p. 164.

(4) 66 Ohio Laws, 149

(7)

on the part of the legislators of maintaining a system of general laws. This was immediately disregarded, however, and on the next day after the adoption of the code, two laws were passed which were very special in their effect. One of them, applying only to Toledo, allowed "any city of the first class advanced to that grade between decennial periods and prior to May, 1867", to issue bonds for the payment (1) of certain assessments which had been declared illegal by the courts. The other law, passed in the interests of Cincinnati, permitted "any city of the first class, having a population of over 150,000, wherein a public avenue of not less than 90 feet width is now projected and established, to issue bonds to the amount of \$100,000 bearing interest at the rate of seven and three-tenths percent, for the purpose of constructing such avenue". (2) Another act of the same year authorized the "city council of any city of the second class, having a population exceeding 20,000 and not exceeding 20,100 at the last (3) federal census" to issue certain bonds.

While the semblance of a broad classification was being kept, the legislature made no very great efforts to conceal the really local character of the legislation.

Purpose and Effect of the First Special Laws.

It is a significant fact that no prohibition of special municipal legislation appeared in any of the states during the first half of the nineteenth century, although special acts for other classes of corporations were in several cases forbidden. (4) It was not until 1851 that the constitutions of Indiana and Ohio extended the prohibition to municipal legislation (5). Iowa and Kansas followed their ex-

(1) 64 Ohio Laws 52. (2) 64 Ohio Laws 130. (3) 66 Ohio Laws 144.

(4) New York, Wisconsin, Iowa, California.

(5) Indiana Constitution, 1851; article 10, section 14; and schedule, par. 5; Ohio Constitution, 1851; article 13, sections 1 and 6.

ample within the next eight years. The explanation for this lies in the nature of these first special laws. (1)

The motive behind their passage must have varied widely in different cases, yet their general effect was to protect the local autonomy of the city legislated for. Even later, when the waste of time and money had led to the prohibition of special laws, the virtual disregard of this provision by means of classification was justified on the ground of the benefit derived therefrom by the cities. An example from Cincinnati was pointed out in a later constitutional convention. That city had developed a rotten borough system, under which one ward had a voting population of two hundred while another had one of two thousand, five hundred. The council and board of aldermen were controlled by less than one-third of the electors of the city. Fruitless appeals had been made yearly to the council, which under the general state law had power to redistrict the city. After its repeated refusals to act, an appeal was sent to the legislature, which then passed a special act effecting the desired reorganization. Other local acts were passed to protect Cincinnati from the corrupt power of its own council, one creating a board of aldermen, the other granting the veto power to the mayor. "These laws", said Mr. John W. Herron, in the convention of 1874, "every lawyer would regard as unconstitutional, and yet so completely were they in accordance with the wishes of the people, so necessary were they to the interests of those corporations, that in but one single instance was there found a citizen ready to go into the Supreme Court and ask to have those laws declared unconstitutional." (2)

In this "necessity" and "popular approval" lay the defence of spec-

(1) Iowa Constitution, 1857; article 3, section 30; article 8, section 1.

Kansas Constitution, 1859; article 12, sections 1 and 5.

(2) Debates of Constitutional Convention, 1873-4; vol. I, pp. 590-2.

ial legislation for fifty years, and it was only when the growth of large cities led to the abuse of this power, that uniformity was demanded.

But the question arises, Why did Ohio lead the other states in this prohibition of special laws. One answer to this question has been based on the ancestry of Ohio local institutions in other states. In the rapid growth of Ohio, Pennsylvania contributed a larger portion of the population than any other state, but with the South, New York, and New England well represented. Such was the predominance of Pennsylvanians that in 1850 their number was two hundred thousand, more than the combined populations from all the New England states. (1)

One might reasonably expect to find evidence of the influence of Pennsylvanian institutions in the Ohio government. This is furnished by the administrative system, wherein is found the Pennsylvania township-county plan of local government, with no deliberative town-meeting, and no representatives of the townships on the boards of county commissioners. This centralization of local organs led to a desire for uniformity, which in turn, brought about the prohibition of special legislation. (2)

Such is one explanation for the action of 1851. (3)

It is true that the states organized on the Pennsylvania plan were the first to forbid special legislation, i.e. Ohio, Indiana, Iowa, and Kansas, but it is difficult to see any direct causal relation between the two points. In the case of Ohio, this action did not come until after fifty years of experience with the county-township organization, and the arguments then advanced were based primarily upon legislative efficiency rather than upon the desire for local uniformity.

On the other hand, the only action of the first constitutional con-

(1) See Wilcox, Municipal Government in Michigan and Ohio, ch. I, part 4.

(2) Randall and Ryan, History; vol. 4, p. 77.

(3) Wilcox, p. 19.

vention for the protection of local autonomy was the guarantee of local election of local officers, a feature which is associated with the deliberative town-meeting and town-ship representation of the New York type of organization. (1) While it may be true that the form of local government has had some effect upon the attitude of states to special legislation, the attempt to prove a direct causal relation between the two has not succeeded as yet; and in the case of Ohio this attitude is to be explained more easily and satisfactorily on the basis of the purpose and effect of the first special laws.

The Convention of 1873-4.

The constitution of 1851 made obligatory the submission, at the end of twenty years, of the question of another constitutional convention. There seems to have been no strong sentiment in favor of it, but the question carried by a bare majority, and the convention convened in 1873. (2)

The merits and demerits of local municipal legislation were thoroughly discussed in a total of more than one hundred speeches. Mr. Roadley of Cincinnati, chairman of the Committee on Municipal Corporations, submitted a draft providing that "The General Assembly shall by general laws provide for the organization and classification of municipal corporations" with the limitation that "the number of such classes shall not exceed six". (3)

"By reducing the number of classes to six", he said, "there will be sufficient flexibility to enable the various cities and villages to be organized and governed (in accordance with their peculiar needs),

(1) Ibid, pp. 13, 14.

(2) Patterson, Constitutions of Ohio, p. 171.

(3) Debates of the Convention, 1873-4; vol. I, p. 578.

11

and to allow the real divisions of corporations to be recognized by law; and yet the number will be so small--that fictitious and unnecessary divisions will not prevail."⁽¹⁾

The arguments against special legislation were summed up by Mr. Hoadley in these words. "It being for a particular object, the general interests of the state are not kept in view and considered, and the members of the legislature, save and except those interested in the particular corporation, do not attend to the matter when it is passed; and more than all that, that such legislation is productive of omnibus and log-rolling legislation."

In reply to this, Mr. Herron, also of Cincinnati, pointed out the danger under general laws, of leaving the exercise of power exclusively within the control and discretion of the municipal council, or the ring which controls it. "I prefer", he said, "that these municipal corporations shall be compelled to apply to the legislature every time that they desire to borrow money, rather than that you shall pass general laws by which they shall have full authority to borrow what they please." He then pointed out the impossibility of governing by general laws and urged the necessity of power in the legislature "to step in and protect the people by some kind of special legislation from the corporate authorities that have obtained control of the cities."⁽²⁾

The convention was not willing to return to the old system of special legislation, and Mr. Herron's motion to strike out the limitation on the number of classes was defeated by a vote of 52 to 27.

A measure which was in effect a compromise between these two theories of general and special legislation was introduced at the beginning

(1) Ibid, vol. I, p. 580.

(2) Ibid, vol. I, pp. 590-2.

of the session by Mr. King of Cincinnati, the president of the convention. (1) He favored general laws for the organization of municipalities, together with acts of "special incorporation". In supporting this plan Mr. King said, "I have no objection to general laws regulating municipal corporations to a certain extent,-- but I am in favor of giving the legislature authority to provide for each city, and town, and village, its own local organization.-- The power of every municipal government to organize and administer its own affairs, subject to restraint by the state within due limits, is and always has been, an axiom of American politics. Of all this independence which the people of Ohio were thus enjoying, the constitution of 1851 deprived us. It repealed at one stroke, and so far as I can discover, without debate or murmur, the independent charters under which all our cities and towns were enjoying each its own little system of organization and management.

"The only object it was to subserve was to get rid of special legislation, but it has rather served to multiply such legislation, and has introduced confusion far worse than any that can be found under the legislation prior to 1851.

"The objection to the whole system is this, that it compels the different cities which must thus be grouped together into one class, to be continually interfering with one another, with regard to all the small details of their home government. It necessarily puts them at war with each other upon every diversity which either or any of the class may seek from the legislature in organization, power, or liability.

On both sides of the controversy there was the desire to let the local wishes of a community find expression in the legislation which would apply to it. The idea of Home Rule had not crystallized as yet,

but its germ existed in the general sense of the convention that state legislation should protect the local autonomy of the municipality, and allow it a limited freedom in its own government. The point of disagreement was the extent of this local freedom, and means of obtaining it.

The supporters of general laws reiterated that such a system, unfettered by classification, would give to every city all the opportunities and privileges of a corporate nature which are enjoyed by any other city in the state. "If one city is given the right by the legislature to do something, why should every other city not have the same right?"

The champions of special legislation maintained that this wide application of all laws was in itself a serious limitation on the legislature, since one city could not be granted privileges which could not safely be conferred upon every other city in the state. Moreover, every city would be forced out of consideration for its own interests to appear before the legislature in support of, or opposition to, any bill which it might be passing in the interests of some other city.

There were fallacies in both arguments. The one party was unduly optimistic over the possibilities in general legislation, while the other presupposed that special laws would be passed by disinterested and conscientious legislators. But it is one thing to have a state legislature pass a law to protect a city from its corrupt ring, and quite another to have a corrupt member log-rolling measures through the legislature in accordance with the dictates of that same city ring.

Looked at now from the standpoint of practical results, the special legislation under the constitution of 1802 differed but little

from the general laws under the constitution of 1851. Both were appropriating the attention of the legislature for matters of interest to single communities only; and the waste of time and money, as well as the careless nature of much of the legislation was as objectionable from the standpoint of the state as from that of the city.

The final action of the convention supported the original plan for division of municipalities into six classes, with general laws for each class. Special acts were forbidden, i.e. acts applying to less than all the members of a single class.

On being submitted to the electorate for ratification, the proposed constitution was decisively defeated by a vote of 102,885 to 250,169. There was left in force therefore the old prohibition of special laws, a provision whose effect had been nullified to a large extent through classification by the legislature and a broad interpretation by the courts.

Classification Becomes Isolation.

The municipal code of 1878 introduced a subdivision of the original two classes into eight grades, of which the first five contained but one city each. In 1894 this process was carried still farther by a law establishing thirteen grades. Cities of the first class were placed in three grades while those entering it from the second class constituted a fourth. In the second class were seven grades; villages were divided into two; and below them came hamlets, containing less than two thousand population.

(3)

The following table, compiled by Mr. Wilcox represents the status of the principle Ohio cities at this time, and shows to what extreme

(1) 75 Ohio Laws 161.

(2) 91 Ohio Laws 14. This law added the third grade to class 2.

(3) Municipal Government in Michigan and Ohio, p. 84.

limits classification had been carried in an effort to isolate cities for the purpose of special legislation.

		<u>Cities.</u>	<u>Pop. in 1890</u>
<u>Class 1.</u>			
Grade 1.	Over 200,000	Cincinnati	296,908
"	2. 90,000-200,000	Cleveland	261,803
"	3. 31,500-90,000	Toledo	81,434
"	4. 20,000-31,500	None (#)	
<u>Class 2.</u>			
Grade 1.	30,500-31,500	Columbus	88,150
"	2. 20,000-30,500	Dayton	61,220
"	3. 10,000-20,000	Possibly 16.	
" 3a	28,000-33,000	Springfield	31,897.
" 3b	16,000-18,000	Hamilton	17,565
"	4. 5,000-10,000	Possibly 28.	
" 4a	8,330-9,050	Ashtabula	8,338.

(#) Inferred from other provisions of law.

		<u>Incorporated Villages.</u>
Class 1.	3,000-5,000.	
Class 2.	2,000-3,000.	
		<u>Hamlets.</u>
(Villages under 2,000)		

Passage from one grade to another could be accomplished only by the voluntary submission of the question by the council to the citizens for decision. This was rarely done with the result that in a short time, very few cities contained the number of inhabitants prescribed by statute for their particular class and grade. For example, Cleveland, which entered class 1, grade 2, in 1853, continued to remain there while its population rose from twenty thousand to over three hundred and eighty thousand. As different cities approached the same population more minute classification became necessary to reach the ends of special legislation, and the absence of automatic progression from grade to grade increased the confusion.

Another potent reason for this minute classification lay in the narrow limits placed by the first general laws on the taxing and borrowing powers of municipalities. The Ohio municipal code of 1852, which divided municipalities into four grades, fixed the tax limits

(16)
for general and incidental expenses at 2 1/2, 3, 3, and 5 mills respectively. In cities of the first class, a tax limit of 2 mills was placed on police, 1 mill for fire-departments, 1/2 for water works, 2 for schools, 1 1/2 for houses of refuge, correction, workhouses, and the city prison, 2 mills for infirmary and poor-relief, and 1/2 for the sinking fund. Loans were permitted only in anticipation of yearly revenues, and limited to \$1,000 for special road-districts, \$50,000 for second class cities, and \$100,000 for those of the first class. Such narrow restrictions cramped the development of growing cities, and necessitated constant legislation for the extension of financial powers.

With these conditions making classification inevitable, and with the general principle upheld by the courts, the volume of amending laws steadily grew, until it reached a maximum in 1889 of one hundred and seventy-six acts conferring power on municipal corporations. Altogether, 1202 such acts were passed between 1876 and 1892. Of these 1134 granted special financial powers.

A few examples will serve to show the shallow artifices employed by the legislature to dress these special measures in the guise of general laws.

One law of 1869 established a board of public affairs "in cities of the third grade of the second class, which were advanced to said third grade, second class, during the year of our Lord 1887, and which had, according to a census taken in such cities in compliance with the provisions of chapter four, division two, Title 12, Revised Statutes, a population of 10,221 on the twentieth day of May in the said year of our Lord, 1887".

Another permitted "any city of the second class, situated in any county having a population of more than 42,000 inhabitants at the last

1) Wilcox, p. 79

2) 86 Ohio Laws 246.

federal census, the commissioners whereof shall have been empowered to erect a court-house" to levy a tax and make contributions towards the expense. (1) At the time, there were four counties containing over forty-two thousand inhabitants and a city of the second class. The legislature then authorized the commissioners in one of them to erect the building, and the law went into operation.

An example of the lengths to which the classification by population was carried is an act of 1872 applying to "villages or cities containing a population of 5,641 and no more, by the federal census of 1870, published in the last volume of the Ohio Statistical Report". (2)

Toledo, with a population of 31,584, was separated for legislative purposes from Columbus with a population of 31,274. (3)

An act for Cincinnati gave any city of the first class over 150,000 power to issue bonds "for the purpose of completing the Eggleston Avenue sewer". Another in 1885 authorized "any city of the second grade of the first class" to issue bonds for a "bridge over Walworth Run in the city of Cleveland." (4)

In 1890 a law was passed which illustrates the defiant attitude with which the legislature circumvented the spirit of the constitution and the position of the courts. This act provided that "in any village situated in a county containing a city of the first grade of the first class, which has heretofore been specifically empowered by a special act of the legislature to issue bonds for the purpose of purchasing a suitable site and erecting thereon a building containing a town hall and offices for the officers of the corporation, and said act has been found to be unconstitutional because of conferring corporate powers,

(1) 64 Ohio Laws 129.
 (2) 69 Ohio Laws 70.
 (3) 70 Ohio Laws 117, 142.
 (4) 82 Ohio Laws 114.

by special act, that the village council of any such village is hereby authorized to issue the bonds of the said village, not exceeding in amount \$17,000, to sell the same, and use the proceeds thereof in purchasing a suitable site, and erecting thereon a building containing a town hall and offices for the officers of the corporation." (1)

This growth of classification had been a gradual one. In its earlier period, it was justified by the evident purpose of the men who framed the constitution, but it soon lost this defence, and was carried to the extent of openly contravening its provisions. From the standpoint of legislation, the cities of the state were now in the same position as under the first constitution, with one important exception. Whereas in the earlier period of municipal growth, legislation had been used to encourage this growth and satisfy the widely different needs of the various communities, it was now employed in the details of administration and in interference with, rather than protection of, local autonomy. With the growth of political parties, another factor, more potent often than the welfare of the cities, began to turn this legislation to its own purposes and hasten the overthrow of the entire system.

Chapter II

The Attitude of the Courts Towards Municipal Legislation.

In the development of legislative functions beyond the sphere contemplated by those who framed the constitution, the courts necessarily play the determining role. Especially was this so in the history of municipal legislation in Ohio under the constitution of 1851. Here the changing attitude of the judiciary and the important consequences thereof tended to emphasize its importance as a factor in determining legislation. During the first decade or two of the new constitution, the courts supported a limited municipal classification, under a broad interpretation of its provisions. Then the force of accumulating decisions forced the courts to permit a gradual extension of classification until that which was virtually the special legislation repeatedly condemned in the constitutional convention, was passed by the legislature and upheld as valid in the courts. A brief sketch of the role played by the courts in municipal legislation prior to 1902 is the scope of this chapter.

Judicial Limitations upon Classification.

The broad decision of *McGill v State*, upholding acts applied to all members in a particular class, was not followed without qualification in later cases, which involved more minute divisions of municipalities. The courts continued to support the general principle of classification but insisted that it be reasonable. Statutes naming particular cities, such as one "to prescribe the corporate limits of the city of Cincinnati", were held unconstitutional, as well as those

(1) *Supra* p.6.

(2) *Bronson v Oberlin*, 41 O.S. 112 (1884).

(3) *State v Cincinnati*, 20 O.S. 18 (1870); also 23 O.S. 445 (1872)

which could never apply to more than a single city. In *State v. Mitchell* the court refused to sustain an "act to provide for the improvement of streets and avenues in certain cities of the second class", but limited to those "of a population over 31,000 at the last federal census" on the ground that it could never apply to any city but Columbus. (1)

On the same principle, a law requiring the approval of a superior court for certain acts was held invalid because only one city had such a court. (2)

The dividing line between laws really general and those special in effect was most clearly drawn in the case of *State v. Hough*, which involved "An act to reorganize and consolidate cities of the first grade of the second class (Columbus), and to reduce the tax levy of said cities". By this law, passed in 1885, the trustees of the sinking fund were authorized to redistrict the city into wards "within five days after the passage of this act". As Columbus was the only city in this grade and class, and as no other city could enter it before the following July, it was clear that the five day provision limited the future application of the act to Columbus, and upon this point the court based its opinion. (3)

Justice Owen said, "It is not the form a statute is made to assume, but its operation and effect, which is to determine its constitutionality". Although Columbus may be the only city affected by the law at the time of passage, "if any other city may in the future, by virtue of its increase in population and the action of its municipal authorities ripen into a city of the same class and grade, and come within the op-

(1) 31 O.S. 592 (1877)

(2) *State v. Smith*, 48 O.S. 211, (1891)

(3) 43 O.S. 98 (1885)

(4) 82 Ohio Laws 54.

(5) In the discussion of this period, liberal reference has been made to Dr. John A. Fairlie's *Essays on Municipal Administration*, of which the *Municipal Crisis in Ohio* and the *Municipal Codes* in the Middle West deal with the subjects treated in chapters I, 2, 3 of this paper.

eration of the act, it is still a law of a general nature, and is not invalid, even if it confers corporate powers.

"On the other hand, if it is clear that no other city of the state can in the future come within its operations without doing violence to the manifest object and purpose of its enactment, and to the clear legislative intent, it is a local and special act, however strongly the form it is made to assume may suggest its general character!"

There was, however, an evident indecision on the part of the supreme court throughout this period, due to a division of sentiment among its members. Judge Okey, who delivered a dissenting opinion in State v. Hugh, had expressed the majority opinion in State v. Brewster (1) that classification should be upheld. In the former case, he intimated that this prohibition against special grants of corporate power does not apply to municipalities, a point which had been considered as settled since the overthrow of a Cincinnati law in the case of State v. Cincinnati. (2)

The uncertainty regarding the attitude of the courts was intensified by its practice of deciding cases brought before it on other considerations, thus avoiding the question of special grants of corporate powers. (3)

Influence of Stare Decisis.

In other cases, the courts upheld acts, whose constitutionality might well have been questioned, on the grounds of policy or the doctrine of stare decisis. In State v. Hudson, Justice Follett declared that "Each of the cities seems to need peculiar legislation which (4)

(1) 39 O.S. 653, (1893)

(2) 20 O.S. 18 (1870)

(3) See Walker v. Cincinnati, 210 O.S. 14 (1871)

(4) 44 O.S. 137 (1895)

can be provided only by such general classification. The peace and prosperity of these cities and the best interests of the state require that this system of classification be regarded as stare decisis and settled."

(1)

Again, in State v Baker , decided at a time when the legislature would not be in session for nearly two years, the court upheld an act virtually special, realizing that "If the law in question were held invalid, two at least of the principal cities of the state would be deprived of any municipal government whatever. No doubtful consideration as to the power of the legislature to pass the act in question could atone for such consequences as these. It is the duty of the court not to overlook such considerations."

To add to the confusion created by these diverse decisions, the legislature made several sporadic attempts to clothe its measures in general form, often relapsing however at the same session into acts which called particular cities by name. And the fact that in many cases the courts sustained such flagrant violations of the spirit of the constitution seemed to justify it.

From about 1890, the supreme court decisions indicate a growing resistance to this abuse of classification by the legislature. This is most clearly shown by the increasing emphasis laid upon stare decisis as the ground for decisions. In these opinions, we can hear the first murmurs of the storm which was to break ten years later.

(2)

In State v Wall, the court said, "Grave doubts may well be entertained as to the constitutionality of this method of classifying cities for the purpose of general legislation. But it has received the sanction of this court in repeated decisions hitherto made, and in view of this fact, and the rule that forbids a court to declare that

(1) 550.3. I (1895)

(2) 47 C.3.500 (1890)

a law enacted by the legislature is unconstitutional unless clearly convinced that it is so, we do not feel warranted in doing so in this instance."

(1)

The next year, in the case of State v Smith, a still stronger position was taken, when the court said, "It must be conceded that the method of classifying cities for purposes of legislation has been carried to the very verge of constitutional authority. Many conscientious minds believe that it has been exceeded. We have heretofore expressed our doubts upon the subject but feel bound by the previous decision of the court, and are disposed to sustain any laws falling within the principle of those decisions, but are unwilling to go beyond them and sanction legislation conferring corporate power which is plainly and palpably special in character."

(2)

About this time a significant decision was delivered in a lower court by Judge Shauck, later of the supreme bench. He felt bound by the decision of the superior court to uphold a law of special application, but took direct issue with it and declared the act to be "in direct conflict with the plain provisions of the constitution." He said further, "It is well, if not widely, known that most of the eminent judges who participated in the decisions upholding such classification, lived to regret the decisions and to deplore the results which followed them."

Later when on the supreme bench, Judge Shauck, together with Judge Burket, dissented from all the decisions upholding classification. Gradually as the membership and sentiment of the court changed, others took this same view, until in 1901, when hopes for reform seemed especially low, owing to the defeat of certain proposed legislation, Judge Shauck found himself with an undivided court behind him.

(1) 48 O.S. 211 (1891)

(2) Carr v Village of West Carrollton, 8 Circuit Court, Reports 1.

The Fugh-Fibler Code.

(1)

This defeated legislation was the Fugh-Fibler code of 1900. Five years before, the Ohio State Board of Commerce and thirty-six affiliated municipal organizations had passed resolutions asking the legislature to repeal the classification of municipal corporations, and establish uniform laws. The result was the appointment by the governor in 1898, of a commission to prepare a bill with this in view. (2) The commissioners, Mr. David F. Fugh of Columbus and Mr. Edward Fibler of Newark, drew up a bill for a municipal code, and in summing up their work, recommended to the legislature "the abolition of municipal classification and the government of cities by local councils rather than by the state legislature".

The provisions of the code fall under four heads.

1. Further classification beyond that in the constitution was forbidden, as also legislative interference with the details of municipal government, a measure which would have tended to protect local autonomy.

2. Legislative and administrative functions were separated and vested in distinct bodies. The former were placed in a uni-cameral council of seven members (six for villages), of which three were to be elected at large, and the rest from wards. The mayor was given extensive veto power and the appointment and removal of the heads of the four depart-

(1) On this period, reference has been made to Fairlie, Essays on Municipal Government; The Municipal Crisis in Ohio and Municipal Codes of the Middle West; Ellis; Municipal Code of Ohio, Introduction. Fibler, The Work of the Ohio Municipal Code Commission, and Blandin, The Work of the Ohio Commission, both in the Report of the Conferences for Good City Government, vol. I (1899)

(2) Commission authorized by statute of April 25, 1898, 93 Ohio Laws 302.

ments of Accounts, Law, Public Safety, and Public Improvements. This was essentially the federal plan of government then in force in Cleveland.

3. A system of civil service examinations was applied to all officers except heads of departments, teachers, and a few others. The administration of this was placed in charge of a board appointed by the governor, and all appointments to fill vacancies were to be made from the names standing highest on the list of eligibles. The mayor might remove any officer on assignment of a reason.

4. Nomination by petition and non-partisan election were provided, the elective officers being the mayor, treasurer, councillors, police judge, and clerk of the police court.

There was also authorized municipal ownership of public service utilities including street railways and telephones.

This recommendation of the commission was a decided advance towards Home Rule. It would have made impossible the so-called "ripper legislation", and greatly limited state administrative interference. The separation of powers, concentration of responsibility, civil service and election reform would have encouraged efficiency and economy. But the virtue of the proposed code proved its fault. On the day of its final reading in the assembly of 1900, word came from some of the larger cities that its passage must be stopped, and it was buried in committee. One argument against the code was its length of 1509 sections, but probably a more cogent reason for its defeat was the provision for non-partisan nominations. To facilitate its passage, the State Bar Association instructed an amendment committee to eliminate these sections, together with those dealing with municipal ownership of public utilities. In this form, the code was reintroduced in 1902, and again it was defeated by the opposition of the larger cities.

Changing attitude of the Courts and the Legislation of 1902.

It was at this time that the courts refused to be bound longer by the principle of stare decisis and took an open stand against municipal classification. In 1901, Judge Shauck declared the doctrine of classification to be "completely discredited".⁽¹⁾ Immediately there followed several decisions holding invalid acts special in their application. The effect was more cautious legislation by the seventy-fifth assembly then in session. Several local measures were defeated, and those passed were for the most part general in effect, such as a bill for boards of tax-review in all municipalities,⁽²⁾ and the "Longworth Bond Act" for uniform power and method in the issue of bonds for public improvements by all municipalities.⁽³⁾

At the same session, however, the legislature passed three laws in the interests of, or rather against the interests of, particular cities; and on the eve of the downfall of special legislation there can be found no better examples to illustrate the evils which had crept into this system. Cleveland and Toledo, at this time, were under Democratic mayors, whose prominence and success in carrying out reform measures had aroused the antagonism of the Republican state administration. Soon after taking office, Mayor Johnson of Cleveland had presented evidence to the local assessment board showing that franchise corporations were being assessed at only about ten percent of the market value of their securities, while other property owners were assessed at from forty to sixty percent. The board then revised its methods and about twenty million dollars were added to the tax list. The franchise companies appealed to the state board, composed of the

(1) State ex rel Cheets v Cowles, 64 O.S. 179 (Feb. 1901)

(2) 95 Ohio Laws 481.

(3) 95 " " 318.

governor, attorney-general, and state auditor, all three being Republicans. The board remitted the additional assessments, and thus deprived Cleveland of over \$450,000 in taxes. Then, in order to conserve the fruits of this victory, and take the whole matter out of the Democratic mayor's hand, the legislature passed an act on May first, permitting the county auditor of any county to request and secure from the state board of appraisers and assessors the appointment of a board of tax review, to supersede all other local bodies. The bill was passed by
(1)
a Republican vote.

Another act aimed at Cleveland concerned the park department. By it the control and administration of the Cleveland parks were transferred to a county board appointed by a Republican official.⁽²⁾ The Cleveland council was helpless to prevent its passage, but attempted to secure an amendment permitting its referendum to popular vote. This was killed, and the measure passed by a party vote, against the wishes of the city and its representatives.

The third act affected Toledo alone, though made applicable to all cities of the third grade of the first class.⁽³⁾ It substituted a bi-partisan police commission appointed by the governor, for the locally elected police board. But when the appointees of Governor Lash had duly qualified, the members of the old board refused to surrender the books and papers belonging to the offices, alleging that the act was a special grant of corporate power and therefore unconstitutional. On a petition for mandamus against them, the case came before the supreme court, and Judge Chauck rendered the first of the epoch-making opinions of 1902, which swept away the whole structure of classified municipal legislation.

1) Maltbie, Home Rule in Ohio; Municipal Affairs, 1902; pp. 239-44.

2) 95 Ohio Laws

3) 95 " " 203, April 17, 1902.

The Crisis of 1902.

Two important questions were involved in the Toledo case.¹⁾ First, should the court follow the decisions of almost fifty years and consider as general a law which applied to a grade and class of municipalities containing but one city, but was so worded that other cities could later enter the same grade and come under the operation of the act; or should it rather consider the evident purpose of the classification and its practical effect in determining its general or special character? In answering this question, Judge Shauch referred to the earliest examples of classification and said, "By an unvarying rule, the characteristic of population was made the basis of the classification, and it was made inevitable that every city attaining a population of twenty thousand should advance, and become a city of the first class. -- Advancement was by a rule of unvarying application, and every municipality might become subject to the operation of every statute conferring corporate power upon its own or a higher class.

"The judicial doctrine of classification was that all the cities having the same characteristic of a substantial equality of population should have the same corporate power, although another class might be formed upon a substantial difference in population.

"The classification now provided, affords no reason for the belief that it is based upon such substantial difference in population as the judicial doctrine contemplated, -- or upon any other real or supposed differences in local requirements. Its real basis is found in the differing views or interests of those who promote legislation for the different municipalities of the state. -- The body of legislation relating to this subject shows the legislative intent to sub-

(1) State ex rel Knisely v Jones, 66 O.S.453, June 26, 1902.

stitute isolation for classification, so that all the municipalities of the state which are large enough to attract attention shall be denied the protection intended to be afforded by this section of the constitution."

Thus by a unanimous decision, the court overthrew a long line of (1) decisions which had upheld the theory and practice of classification. The mere fact of its special nature was not enough to invalidate the law, since not all special laws were prohibited by the constitution.

The second point upon which the decision depended was the definition of corporate powers to be followed, or, more specifically, the question, are corporate powers those powers only which are conferred upon municipalities? If so, the Toledo law could be upheld, since the constitution forbade only those special laws which confer corporate power. On the second question, as on the first, the court had before it a long line of decisions, many of which involved the same point, namely the appointment of police boards. As early as 1859, the legislature had passed a statute establishing a board of police commissioners in cities over 80,000 (Cincinnati being the only answering this (2) description), and vesting in it the usual powers of such a board.

This was taken as the model for later acts of a similar nature, and in almost every case the courts upheld them as not grants of corporate

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- (1) State v Mitchell, 31 O.S. 592, (1877)
 Bloom v Xenia 32 O.S. 461 (1877)
 McGill v State, 24 O.S. 228 (1877)
 State v Hoffman, 35 O.S. 435 (1880)
 Railroad Co. v Walrath, 38 O.S. 461 (1882)
 State v Constantine, 42 O.S. 437 (1884)
 State v Lugh, 45 O.S. 98 (1885)
 State v Liesewetter, 45 O.S. 254 (1887)
 Weil v State, 46 O.S. 450 (1889)
 State v Shearer, 46 O.S. 275 (1889)
 State v Jacob, 52 O.S. 66 (1894)
 Mason v State, 58 O.S. 30 (1899).

(2) 56 Ohio Laws 48.

power.

A special reference to one of these acts is germane because of its close similarity to the Toledo law. In 1876, the legislature passed a law for Cincinnati, providing that "in all cities of the first class having at the last federal census a population of two hundred thousand and over, the police powers and duties shall be vested in, and exercised by, a board of five members, to be appointed by the governor for a term of five years," and vested with all the powers previously exercised by the board of health.

(2)

When brought before the court, the law was declared to be "essentially local and special in its nature", but it was upheld as constitutional on the grounds that "the board which the defendants constitute, is not a corporation, nor are its powers under the statute within the meaning of this section (article 13, section 1)".

(3)

By common judicial assent, then, corporate powers had been considered as those granted to a municipality, as distinguished from those vested in a state organ. The wording of the Toledo law offered no grounds for dissent from this doctrine, since it was almost identical with that of the former law. To quote the precise terms, it provided that "All police powers and duties connected with, and incident to, the appointment, regulation, and government of a police force in cities of the third grade of the first class, shall be vested in, and exercised by, a board of police commissioners, to be appointed by the governor".

But again Judge Shauck refused to let stare decisis determine his opinion, and declared such a grant of power to be unconstitutional.

"It is no longer doubted", he said, "that the corporate powers contem-

(1) State v Baughman, 38 O.S. 455 (1882); Walker v Cincinnati, 21 O.S. 14 (1871)

(2) 73 Ohio Laws 70, sections 1, 2.

(3) State ex rel Attorney-General v Covington, 29 O.S. 102. (1876)

related by this section are those conferred upon municipalities, as well as those conferred upon private or commercial corporations." Rejecting the previously accepted theory of corporate powers, he defined them as "such powers as are usually conferred upon corporations".

In a word, this decision changed the old line of demarcation between general and special laws, which had been considered as settled since *State v. Fugh*, in 1885, and overthrew the definition of corporate powers under which the police of a dozen cities had been organized. Serious as the results of the decision were, more vital changes were effected by a case involving another city of the state.

On the same day, a decision was rendered in a quo warranto suit brought against Beacom and the other members of the Cleveland board of control, attacking the act under which they held office. As in the case just cited, politics lay at the bottom of the action. For some years, the street-railway interests had bitterly opposed the granting of franchises to a competing corporation upon a three cent basis. After blocking the grant once on technical grounds, they attacked the city government itself as a last resource, questioning the validity of the law under which it was organized.

An act of March 16, 1891, for "cities of the second grade of the first class", had established the Cleveland Board of Control, made up of the six directors of law, public works, police, fire service, accounts, and charities and corrections. Under the strict standards set up in the Toledo case, there could be no doubt but that this law was unconstitutional, and the court so ruled. But it added, "while a judgment of ouster must follow our conclusions, we think public considerations will justify such suspension of its execution as will give to

State ex rel Attorney-General v. Beacom, 66 O.S. 491.
 (2) 88 Ohio Laws 105.

those discharging the duties of the other departments of the government of the state an opportunity to take such action as to them may seem best, in view of the condition which the execution of our judgment will create; and this suspension will be until the second of October, 1902".

(1)

A third case, decided two days before, upon the same principles, overthrew a grant of power to the trustees of the Cincinnati hospital.

Here again the court departed from the path laid down by previous decisions.

(2)

By an act of 1861, the management and control of this hospital, originally established by a law of 1821, were vested in a board of seven trustees who were given power to "make rules and regulations for the conduct and government" of the hospital. The law was attacked as a special grant of corporate power, but upheld by the supreme court, which said, "We discover nothing in the provisions of the act either constituting the trustees a corporate body or conferring power on a corporation already existing".

(3)

No consideration was given by the court to the question as to whether the power to tax was incidentally granted by the law, or whether an earlier act authorizing taxation for the erection of the hospital, was constitutional. In 1864, an amending act was passed, providing that the "rules and regulations" of the trustees should be submitted to the Cincinnati council for approval, after which they should have the force of ordinances. The court drew a distinction between these two acts and declared the void as a special grant of corporate power. Justice White said, "The power here attempted to be conferred, is not vested in the members of the council as individuals, but is sought to be vested in the

(1) Cincinnati v Trustees of Hospital, 66 U.S. 440, June 24, 1902.

(2) 58 Ohio Laws 151.

(3) State v Davis, 23 U.S. 434, (1872).

council in its legislative and corporate capacity." Finally in 1902 the legislature passed a law authorizing the hospital trustees to issue Cincinnati bonds for the payment of certain repairs and improvements. In holding this to be a special grant of corporate power, the court emphasized the point that bond issues necessitated taxation, which was clearly a corporate power. Whether this position was justified or not, it indicates a change from that taken with regard to the law of 1861, upheld by the court, since the latter act involved the control of offices and property all of which were supported by taxation.

By this series of decisions, municipal affairs in Ohio were thrown into an unparalleled state of confusion. It was apparent that the government of practically every city and village in the state rested to a greater or less extent upon statutes which the supreme court would no longer uphold as constitutional. The legislature was not in session and would not meet ordinarily for sixteen months. In three months the existing government/^{of Cleveland} would cease to be legal, and that of any other city might be successfully attacked at any time.

To add to the chaos, the supreme court had been rendered almost helpless by a blunder in the wording of the "Royer Law" of May, 1902. (2) The act was passed as an amendment to section 6710 of the revised statutes, for the purpose of removing the three hundred dollar limitation on the prosecution of error proceedings in the supreme court, but its practical effect, as worded, was to destroy nearly all of the court's appellate jurisdiction.

Considerations of fundamental importance to the municipalities and the supreme court of the state thus combined to make imperative

(1) State ex rel Attorney General v Cincinnati, 23 O.S.445, (1872).

(2) 93 Ohio Laws 255.

the calling of an extraordinary session of the legislature.

In the light of the situation thus created, it is interesting to note the indications of a growing sentiment in favor of Home Rule. In 1890, Governor Campbell had summoned the legislature together in special session for the purpose of providing a new form of government for Cincinnati. The text of the governor's message was Home Rule, and in one of the concluding sentences, he said, "Now, while the people are awake to their condition, let us return to 'home rule'; let us do that which is always right, and which at this particular juncture is an especial necessity." Five years later, this same sentiment was voiced in no uncertain terms by the State Board of Commerce and its (I) thirty-six affiliated bodies in session at Cleveland. In a series of resolutions, they asked the general assembly to abolish classification, provide the concentration of responsibility and separation of powers in municipal government, with a merit system and uniform accounting, and then declared, "it is essential and necessary to the inception, development, and adoption of reform measures adapted to the needs of the several cities of the state, that the people of these cities shall be accorded the fullest degree of home rule consistent with the principles of the constitution."

Neither the appeal of the Governor nor that of the cities bore immediate fruit in legislative action; but now, in 1902, conditions offered a promising opportunity. Classification had been abolished by the action of the courts. Before the legislature was the task of building up from the foundation a new municipal code.

Chapter III

The Municipal Code of 1903.

In response to the urgent demand, Governor George A. Nash issued on the 22nd of July, the call for a special session of the seventy-fifth general assembly. August the 25th was set as the day for convening, but immediately the governor began to prepare for its work. In order that no time need be lost, he requested Mr. Nicholas Longworth and Mr. Wade H. Ellis, both of Cincinnati, to assist him in drawing up a municipal government bill conforming with the requirements suggested in the recent supreme court decisions. At his request also, the State Bar Association appointed a committee of three of its members to assist in the preparation of the bill. Thus sponsored, it was presented to the convened legislature in connection with the governor's message, and with the specific recommendation "that all parts of said bill, and the bill as a whole, be made a part of the law of Ohio." (1) Bearing the name of "the Governor's code", it experienced a quick passage through the senate, a more thorough examination and amendment in the house, and further modification in joint conference between the two. On the 22nd of October it was signed by the governor and became law.

Seldom has the chief executive of a state played so direct and active a part in the work of the legislature. And this violation of the theory of separation of powers was the more noticeable because at this time the governor of Ohio did not possess the veto power. (2) Its justification can lie only the fact of the extraordinary emergency, which demanded a comprehensive code of laws in the shortest possible time.

(1) Text of Gov. Nash's message in Ellis, Municipal Code; Appendix, p. 847.
(2) First established by a constitutional amendment in 1903.

Theories of Municipal Government Before the Legislature.

(I)

In the debates of the session, two conflicting theories of municipal government occupied the center of the discussion. The one was that of limited municipal Home Rule; the other, that of state control through general laws. The division of the legislature on the basis of these two opposite principles arose out of diverse interpretations of article 13, section 6, of the constitution, "The General Assembly shall provide for the organization of cities and incorporated villages by general laws". Those who interpreted this clause narrowly, believed that it forbade any grant of local self-government. Others, under a broad interpretation, urged a general grant of legislative power to municipalities, under which they might adapt their local government to local needs. In the latter case, a distinction was drawn between the initial organization of the city, which, all agreed, must be accomplished under a general law, and the government of that city after it has been organized. The second, some believed, might constitutionally be left to the determination of the local voters "Nowhere", one member declared, "is it intimated either expressly or by implication, that the power of the general assembly to confer legislative functions upon municipalities is prohibited" (2)

While only a limited degree of Home Rule was seriously considered in the session, it is of interest to note that the question of complete Home Rule was broached. Mr. Thurman of Columbus urged the assembly to "submit an amendment to the constitution of the state, giving to the people of the cities the power to call municipal conventions for the purpose of framing such forms of government as they may deem best, and with the sole power to alter the same by the same means" (1) Proceedings of the Special Committee on Municipal Code, Seventy-fifth General Assembly.

(2) Ibid, p. 456

(1)

when required." This step had been urged before the legislature by Mr. Thurman ten years previously, but ^{with} apparently no response. Now, although the exigencies of the situation precluded the idea of amendment, there existed an energetic faction in both houses, which favored the grant of as much self-governing powers as the constitution would permit.

Codes Before the Legislature.

(a) Ckey-Yorke Code.

Four codes were referred to the House code committee, and of these two were based on the principle of limited Home Rule. One of the latter had been drawn up by Judge Ckey for the Democratic minority. It provided one general plan for the organization of cities, and another for villages, leaving such matters as the number and kinds of departments to the determination of a local constitutional convention.

There were also included in the bill provisions for rigid civil service rules, municipal ownership of public utilities, limited franchise grants, and maximum rates for privately owned public utility

(2)

service.

In introducing the bill, Mr. Yorke interpreted article 13, section 6, of the constitution as meaning that the "General Assembly should provide by a law for the organization of the municipality, -- and after it had become created and organized, that the only control of its future which the General Assembly could retain, would be the power to restrict it in the levying of taxes, making assessments, borrowing money, contracting debts, and loaning its credit."

(b) The State Board of Commerce Bill.

The other so-called Home Rule bill, was the result of work begun years before by the Ohio State Board of Commerce. As early as 1896,

(1) Ibid, p. 18.

(2) " pp. 453-70.

this organization started an agitation for reform in municipal legislation. In 1900 it refused to indorse the Hugh-Hibler code, and introduced a substitute bill drawn up by its own legislative committee. Now, after further study of the problem, it presented a completely revised code for the government of cities and villages, drafted by Judge Gilbert A. Stewart and Mr. H. H. McMahon of Columbus and Mr. Allen Ripley (I) Foote of Chicago.

The bill outlined a general scheme of organization, leaving much discretionary power to the municipality. There was provided a mayor, a uni-cameral council of from 5 to 25 members, and a police court. Definite limits were placed upon the taxing, assessing, and borrowing powers granted. Beyond these points, the organization and functions of the municipality were to be determined by a local constitutional convention. It was stipulated that the constitution should "Provide a scheme of organization and (determine) all administrative officers and boards necessary for the good government of the corporation and the exercise of its corporate power; prescribe their duties, fix their terms, salaries, bonds, and methods of selection and removal, and provide methods for filling vacancies". Every city and village was empowered "to make and enforce within its limits, all such local, police, sanitary, and other regulations as are not in conflict with general laws, and to -- create indebtedness, levy taxes and assessments, and enact and enforce by reasonable fines, penalties, and imprisonments, all necessary ordinances and resolutions."

The plan of the Board of Commerce was thus to satisfy the constitutional requirements by providing through general laws for the framework of municipal organization, while at the same time allowing to each community a free hand in the completion of its system of government.

The objections urged against this code were three-fold. It was contended (a) that the bill was unconstitutional; (b) that it would produce diversity instead of uniformity in municipal government; and (c) that it was visionary and impractical.

The first objection was the prominent one in the debates, since both parties to the controversy expressed the belief that Home Rule should be granted in as large a measure as the constitution would permit. (1)

Mr. McMahon argued in its defence that the bill met all the requirements of the constitution, being general in form, and providing for the organization of all cities and villages. Two possible points of attack were nevertheless suggested by him;—(a) that the bill was a delegation of legislative power, and (b) that in permitting a diversity in the forms of municipal government, it would violate article 2, section 26 of the constitution, reading "All laws of a general nature shall have a uniform operation throughout the state".

In refutation of these arguments, Mr. McMahon showed that an exception to the general rule forbidding the delegation of legislative power was made in the "right of the legislature -- to confer upon towns and other inferior municipal organizations the powers of local government and especially of local taxation and police regulations," and that "It is for the legislative discretion to determine within the limitations of the constitution to what extent, city or town councils shall be vested with the power of local legislation" (2)

In regard to the second point, he contended that the uniformity requirement extended only to the law itself, and not to the local governments which might be established under it. In the wording of the Illinois Supreme Court, where a similar constitutional provision existed

(1) Proceedings, p. 86. For Mr. McMahon's discussion, see pp. 85-97.

(2) Cooley, Constitutional Limitations, p. 226.

(3) Burkholter v McConnellsville, 20 O.S. 308, (1870)

ed,"the ordinances to be adopted by different municipalities under the powers so conferred (i.e. by general law) may be as variant in their terms as the varying municipalities or sense of public policy in those who exercise the legislative authority, may require".
(1)

In spite of these arguments, the sentiment of a majority of the committee, as well as of the entire House, was against such a grant of Home Rule power. It would be difficult to determine whether this hostility arose from objections to the general principle involved, or whether it was due to a sincere feeling that such a grant would be unconstitutional.
(2)

It is significant that later in the session, a resolution for a Home Rule amendment was voted down, an action which suggests that the real opposition to this bill was based on other than constitutional grounds. Yet there was much support for the latter position. Mr. Ellis considered the bill "clearly unconstitutional" and Special Counsel Bennet of the attorney-general's office declared that no power beyond those in the governor's code could constitutionally be granted to a municipality.

Immediate legislation was imperative,, and there was no inclination on the part of the legislators to risk a possible nullification of their work by an adverse court decision. Nor was there any means of foretelling what position the supreme court would next take in its fluctuating attitude towards municipal legislation. Such was the uncertainty over this, that leaders in the House openly considered the advisability of asking the court to disregard precedent and give a strong hint as to its probable attitude towards the proposed legislation.
(3)

Considerations of this nature naturally bred a conservative attitude, and conservatism inevitably strengthened the party supporting

(1) Covington v East St. Louis, 78 Ill 548, (1875)

(2) See contra p. 49

(3) Liberal reference has been made to contemporary newspapers.

the Governor's code, since this measure involved no departure into untried legislative paths. For this, and other reasons, the advocates of Home Rule were unable to carry either of their proposals through the committee stage. Their work was none the less significant as indicating a wide and increasing sentiment which was to go on gathering force until it came to a head in the constitutional convention of 1912.

The extent of this sentiment is roughly shown by data which the Municipal Association of Cleveland collected about this time from over one hundred cities, of which eighty were within the state. Eighty-one per cent favored Home Rule to the fullest extent possible under the constitution; nineteen per cent qualified this by stipulating limitations on municipal bond issues and taxation, or the appointment of police boards by the governor; but not a single city expressed opposition to the principle of Home Rule.⁽¹⁾

The two codes still to be considered were based upon the theory that the constitution required the legislature to provide in detail for the government and organization of municipalities. These were the so-called Federal code and the Administration or Nash code.

(c) The Federal Code.

The Federal code, introduced by Mr. Guerin of Erie, represented directly the Cleveland interests, but was strongly supported by the Columbus Board of Trade and other smaller cities.⁽²⁾ Following almost precisely the wording of the Nash code, it granted much the same powers to municipalities, but organized them under the federal plan rather than the board plan as in the Governor's bill. Besides a mayor and a council, there were provided four executive departments, law, public safety, public improvements, and accounts, the directors of which, with

(1) Figures furnished by Mr. T. H. Hogsett of Cleveland.

(2) Proceedings, pp. 479-95.

the exception of the latter, were to be appointed by the mayor. The director of public safety was given appointment and removal powers over the police and fire departments under civil service rules, which were also extended to the health department and made optional for all other employees of the city. A bi-partisan board, appointed by the governor, was placed in control of the civil service organization. Executive and legislative functions were clearly separated, and administrative responsibility centered in the mayor, with power to remove heads of departments, veto ordinances, and make up the budget, but subject to removal by the governor.

It was urged in support of the bill that its provisions were as applicable to a small city as to a large one, since there were no boards to be filled, and, if need be, two departments might be placed under the same person. Cleveland and Columbus, the two cities of the state which were organized under the federal plan, were its most prominent champions, and the reputation for good government enjoyed by the former, should have insured its serious consideration by the legislature.

But by the end of the first two weeks of the session, it had become evident that the final legislative action would be based on no one of the three codes outlined above, but on that one which had been prepared under the direction of the governor and introduced in the Senate by Mr. Nicholas Longworth. On September 9th, the Republican members of the Senate agreed to support the general provisions of the Nash code, and on the 15th, the code committee of the House came to the same decision by a vote which represented strictly party lines with but one exception. The origin of the bill having been described, a closer analysis of its provisions is appropriate.

Drafted by citizens of Cincinnati, with little reference to the wishes or advice of officials of other large cities of the state, the code very naturally provided a form of organization based on the (I) "board" government then in operation in Cincinnati. Outside interests were able, nevertheless, to effect several changes in the bill before its introduction in the legislature. The most important of these concerned the police board. In the original draft, appointments to the police force were to be made by the governor acting through a board of commissioners appointed by him, a feature of the Cincinnati plan which was understood to be favored by the Governor. As rewritten, the code vested full control of the police in a bi-partisan board of four, appointed by the mayor, such a change having been recommended by a committee of the State Bar Association. Other minor changes took the control of the fire-department from a separate board, placing it with the police under the board of public safety; and reduced the minimum limitation on the size of the council.

As introduced, the Nash code divided cities and villages at the five thousand population line, and provided the following organization;- a council of at least seven members, of whom three should be elected at large; a mayor, auditor, and treasurer elected for three years; a solicitor and minor officers appointed by the mayor; a board of public service, of three elected directors, vested with control of all public works and institutions, including the health department; a bi-partisan board of public safety, of four directors appointed by the mayor, over the police and fire departments. The merit system was nominally provided for in the two latter departments, but to a very inad-

(I) On the provisions and history of the Nash code, reference has been made to Fairlie, Municipal Crisis in Ohio; the Proceedings of the special session; the text of the bill as introduced (Senate Bill 1) and as reported by the House (House Bill 5); and current newspapers, more especially the Cincinnati Enquirer and Ohio State Journal.

equate extent. Municipal classification was suggested only in the one provision that cities over three hundred and fifty thousand should have two police judges.

The Role Of Politics.

The early debates in both houses of the legislature made it apparent that political considerations were to determine its final action. Mutual suspicion characterized the attitude of the two political factions towards each other. Republican leaders were eager to weaken the influence of the Democratic mayor of Cleveland, Tom L. Johnson, and in the defeat of the proposed federal code, they saw an opportunity not only of accomplishing this end, but also of striking a blow at the party which had elected the mayors of the two federal cities. On the other hand, the Democrats and some Republicans were antagonized by the suspected influence of Boss Cox and Senator Hanna.

The "curative act," which regranted for unexpired terms all municipal franchises regardless of existing laws, was an example of what many in the legislature believed to be the dictation from Cincinnati. The measure in question was introduced by Judge Hosea of that city, for the obvious purpose of getting around the decision of the Hamilton County Superior Court, declaring unconstitutional the Rogers fifty year franchise grant to a local street railway corporation.

Thus state and local politics, personal antagonism, and suspicion combined to render improbable a fair and candid consideration of the merits of the various proposed codes.

Changes In The Nash Code During Passage.

In the Senate, the Nash code was considered in committee of the whole, where it met with little effective opposition, and was passed

substantially in the same form as when introduced. In the House, the bill went immediately to the special committee on codes, and here it was subjected to a thorough examination and criticism. The most vigorous attack on the measure came from the champions of the federal system, who declared a board plan to be unsatisfactory, and entirely impracticable for the smaller cities. As a result of this criticism, the House substituted single directors for the boards, an action which had been defeated in the Senate by the narrow vote of 16 to 15. Other features which brought forth extensive criticism in the committee hearings, were the lack of effective merit provisions and the franchise sections. It soon became clear that the bill could not pass in its present shape.

After extended discussion and debate, the House at length passed a substitute bill, differing in many respects from the Governor's code and longer by fifty-six pages. (I) Single, elective directors of public service and safety were provided in place of the clumsy boards; civil service rules were extended to the fire and police departments under a bi-partisan commission appointed by the governor; and the health department, libraries, and parks and hospitals were placed under separate boards.

The final vote on this substitute, 61 to 25, roughly represented the strength of the two parties, although four Democrats voted for the bill, and twenty-two members refrained from voting. The Senate refused to accept the House measure, and a joint conference committee of ten was chosen. This met for ten days, then reported to the two bodies, and the final bill was passed and became law on October 22nd.

In the deliberations of the conference committee, the House bill was taken as the basis of action, and most of its features were retained, with the exception of those relating to the departments of

safety and service, which were again placed under the board organization. The final vote in the Senate divided on party lines, 31 Republicans voting for, and 12 Democrats against. In the House, the closing speeches were particularly acrimonious in their reference to boss control, and the final vote of 65 to 34 echoed the party feeling, although three Democrats chose to support the measure.

At the very close of the session, there was passed a bill of minor importance, but whose nature created an almost ludicrous situation. Although the legislature had been called together because of court decisions declaring special acts invalid, and for the purpose of supplying a substitute for these acts, its last act was to pass a law authorizing the board of education of Zanesville to issue bonds amounting to \$25,000. The members smiled as they voted. (1)

The Code.

The fruit of the eight weeks session was the Nash code, substantially as introduced, but with changes as to the boards, terms of councillors, merit system, and a few minor matters. (2) Under its operation, every city must have a council of at least seven members, increasing with the population on a specified ratio, and elected partly at large, partly from wards; a mayor, president of council, treasurer, (3)

(1) As the legislature rose for the last time, certain members from Cleveland led their friends in the following doxology, whose humor doubtless covered what was rather bitter feeling.

"Praise Cox to whom all blessings flow;
Praise him, all people of Ohio;
Praise Hanna, Nash, and all the host,
But praise George B. Cox the most."

(2) For text and notes, see Ellis, Municipal Code.

(3) After the council should have reached a size of fifteen, one member in every five, should be elected at large. Of Cincinnati's twenty-nine councillors, five were elected at large.

urer, and solicitor, elected for two years, and an auditor elected for three; a board of public service of three or five members, subject to the decision of the council, elected for two years, and given control of most of the public works and institutions; a bi-partisan board of public safety of two or four members, appointed by the mayor, or by the governor in case the mayor's appointments should not be ratified by two-thirds of the council within thirty days, placed over the fire and police departments, and made subject to very weak civil service rules in the matter of appointments; and finally a board of health, a sinking fund and tax commission of four, and a library board of six, all appointed by the mayor.

Under the code and existing statutes, every municipality could own and operate lighting, power, and heating plants, markets, libraries, hospitals, and universities without further grants of power from the legislature.

In several respects, the code of 1902 marked an advance in state legislation for municipalities. The flexibility in size of the principle boards removed one of the greatest objections to the board plan, while the extensive power given to the board of public service marked a promising tendency towards simplification and centralization in city government. There was, moreover, a promise of increased efficiency in the council in the provisions for the election of some members at large. Looked at from the standpoint of the state, the code's chief merit lay in the reduction of legislation which it would entail.

Response From The State.

These redeeming features were quite generally overlooked in the storm of criticism and remonstrance which sprang up on all sides.

Aside from the partisan objections of the Home Rulers that complete local self-government was being denied, and of the federal enthusiasts that an inferior plan of organization had been imposed, there were substantial grounds for criticism.

The provision that appointments to the boards of safety should be made by the governor if the mayors' action was not confirmed by the councils amounted almost to a guarantee that in Cleveland, Toledo, and other Democratic cities, these important offices would be filled by the Republican governor. (I) The concentration of power in the elective board of public service without a corresponding prominence of position opened the way for political influence and corruption, while the mayor whose prominence would tend to secure the choice of an efficient man, had no power of control over the boards.

The merit provisions for the police and fire departments were rendered almost ludicrous by a slight change in the wording, made during the passage of the bill. Appointments to these departments were to be made by the mayor from the three highest names on the register of eligibles. The candidates, however, were to be arranged on this register not "in the order of their relative excellence, as determined by examination", which was the original wording of the provision, but "in the order of their relative examinations". Thus by the wording of the law, appointments were apparently made dependent upon priority in examination rather than upon excellence shown therein.

Another small change made during passage, permitted the rushing of franchise grants through a council if three-fourths of the members should vote to suspend the rule requiring the passage of such ordinances on three different occasions.

(I) See contra, p. 60, for the operation of this provision.

Though has been said to indicate how signally the legislature failed to measure up to the opportunity for advanced municipal legislation. The Republican press of the state rallied half-heartedly to the defence of the code, while apologetically acknowledging its "possible defects". Democratic state papers attacked it fiercely, as might have been expected, and the outside press was hardly less derogatory.

The Springfield "Republican" (Independent) commented editorially, "It violates the principles of home rule, of executive responsibility, and of non-partisan departmental boards in the most flagrant manner, and all for the purpose simply of keeping the spoils of the cities in Republican hands and the grip of the bosses upon municipal rule."

The Chicago "Evening Post" (Ind.) saw in the code the triumph of bossism and partizanship over political principle and municipal interest and progress", while the Brooklyn "Eagle" lamented that the "home rule doctrine -- embodied to a notable extent in our New York charter is left nowhere in this Ohio code."

The Syracuse (N.Y.) "Herald" criticised particularly the "weakened responsibility of the mayor" and termed the law "a distinct step backward".

Constitutional Changes Proposed.

During the special session, the fear on the part of some advocates of Home Rule that their measure could not be sustained under the constitution as it then stood, led to the introduction of a resolution calling for the submission of a constitutional amendment. This provided that "any city containing a population of more than 3,000 inhabitants may frame a charter for its own government consistent with the constitution and laws of this state, and such charter, when adopted as hereinafter provided, shall supersede any general enchart-
(1) House Joint Resolution, no. 5, by Mr. Meisel of Cleveland.

ering statute enacted by the General Assembly as to such city". Other provisions concerned the machinery of charter framing, the form of organization, with a mayor and council, and state limitations upon the municipal powers. The resolution was defeated by a vote of 29 to 33.

The question of a constitutional convention was brought up in the House, but there was little sentiment for this and the matter soon dropped. In the closing hours of the session, there was carried by joint resolution a proposal for a constitutional amendment legalizing the classification of cities. These classes were to be; (a) cities over 100,000, (b) those between 25,000 and 100,000, and (c) those below 25,000. On submission to the electorate in November, 1903, the amendment failed of ratification,⁽¹⁾ and no further movement for constitutional change in the interests of Home Rule attained any importance until 1912.

During the session, the Royer law, limiting the appellate jurisdiction of the supreme court, had been repealed, and the second main purpose for which it was called, thus satisfied.

In the meantime, further judicial action was necessary to bolster up the government of Cleveland which had been rendered theoretically illegal by the recent decision of *State v Beacom*. It will be remembered that the execution of that judgment had been deferred until October second, but as the new code was not to go into effect until the first Monday in May, 1903, a further suspension was made imperative. This was accomplished by an order of the supreme court on the eighth of November, 1902.

From the standpoint of constitutional law, this suspension of the execution of a judgment is of interest in view of the theory that

(1) Total vote at the election, 877,203; For, 21,664; Against, 32,110.

See Patterson, Constitution of Ohio, p. 285.

an act held unconstitutional by a court is void from the beginning.

The supreme court, in effect, declared the government of Cleveland to be illegal, but agreed to overlook that fact until the necessary legislative steps could be taken to remedy the defect. "And thereby", as Judge Burket observed in a later case, "the wind is tempered to the shorn lamb."⁽¹⁾

(1) In *State v Spellmire*, 48 B.42, an act establishing a special school district was held unconstitutional, but Judge Burket suggested a suspension of judgment similar to that in the Cleveland case. See on the theory of constitutional law, Cooley, *Constitutional Limitations*, 6th ed., p.222.

Chapter IV

A Decade Of Uniformity .

The municipal code of 1902 established a uniform organization for the seventy-two cities of the state, cities which presented the most widely varying conditions of population, location, economic interests, and political experience. At the top of the list stood Cleveland with a population of 281,768; at the bottom, ⁽¹⁾ainesville with 5,024. Cleveland was permitted a larger council, and two more members on each of its two principal boards, but otherwise the governments of the two cities were identical. The larger municipalities of the state, which had hitherto enjoyed each its own particular form of organization, were now conformed to a rigid plan of government, framed not to meet their peculiar problems, but to accommodate, however imperfectly, the smallest cities as well. Nelsonville, just emerged from the village ranks, might have no very vexing problems of public utility service, charity administration, and sewage disposal; yet it must maintain three directors of public service, because a similar board was considered necessary for Cleveland and Cincinnati with their complex functions along these lines. While the new code did not forbid the vesting of two offices in a single person, this method of eliminating unnecessary officials could not be used in the case of the numerous boards, whose size was stipulated, and where service by one person on more than one board might not be practicable.

The new rule of uniformity required the abandonment of existing forms of organization in many cities. Youngstown and Akron, which had been operating under the city commission law, considered the new government, with its divided powers, weakened executive, and scatter-

(1)U.S.Census, 1900.

ed responsibility. The "federal" cities of Cleveland and Columbus must relinquish a successful form of organization for one which had not proved its merit in operation in Cincinnati. Norberton, with a city organization and a population of 6,000 in 1902, must return to the village class, because, by the census of 1900, it had had only 4,354 inhabitants. In every city was the confusion incident to governmental change.

General Dissatisfaction with the Code.

It is not surprising that the newspaper files of this period echo remonstrances from all parts of the state. (1) Some of the objections were based upon the provisions of the code. For example, certain cities complained that salary expenses were being unduly increased; while others expressed dissatisfaction with the amount of the taxing power vested in the mayor and council. Under the latter point, was cited the Longworth bond act, passed in May, 1902, and embodied in the code. (2) This act authorized the council, on a two-thirds vote, and without reference to the tax-payers, to issue bonds amounting to one-percent of the tax duplicate for any of twenty-seven specified purposes. This and other tax provisions made possible a levy of approximately three and one-half percent without the consent of the tax-payers. In Columbus, this would amount to \$2,340,000. Such a power in a body whose size tended to scatter responsibility, was felt to be dangerous. Other critics of the code pointed out the defects noted in the preceding chapter. (3)

In many cases these complaints were due rather to political conditions rather than to the code provisions themselves. One source of friction lay in the redistricting of the cities, in which oppor-

(1) Newspaper references are not given as most of the discussion is of an editorial nature, with little definite data.

(2) Section 2835 R.S.

(3) *Ibid.*, pp. 47-49.

tunities for gerrymandering. Columbus Democrats feared the action of the Republican council in forming new wards, while the cry came from Wooster less than two months after the close of the special legislative session that the Democrats had robbed the Republicans of their proper share of seats in the council. In Dayton, however, where the existing ward division was far from equitable, it was hoped that the redistribution might adjust political conditions in the council on a fairer basis. Much of the press discussion was violently partisan, and possibly some of the criticism entirely ungrounded, but it cannot be doubted that the uniformity imposed upon these cities was felt to be a check on the development which they had been enjoying before 1902 under special legislative provisions.

Municipal Functions Limited.

This rule of uniformity extended beyond the form of organization. It applied to the powers of the cities, and the exercise of the most minute municipal functions. And in this, the legislators of 1902 went further than the framers of the constitution seemingly intended. The latter had indicated that the rule of uniformity was to apply to private as well as municipal corporations, both being organized under general laws. Private corporations, however, were never subject to these rigid restrictions of law concerning the details of their operation. They were required to conform to the broad rules of organization, but the method of their operation was largely left to their discretion. A further flexibility was made possible in the case of private corporations by varying ~~the~~ the legal requirements in accordance with their varying character. Not so with the cities. These were regulated to an extent never attempted with private corporations. Not only the form and details of organization were prescribed, in disregard of the

principle that administrative detail is not a legislative matter, but the functioning of the municipality was minutely detailed. And under the accepted theory, cities were held to possess only those powers which had been specifically granted to them by the state. While in Michigan, Indiana, and Kentucky, judicial decisions had recognized an inherent power of local self-government⁽¹⁾, Ohio courts had never agreed with this doctrine. As early as 1849, the supreme court held that "municipal power can only be exercised where it is specifically granted in the act of incorporation."⁽²⁾

Under this theory, the Ohio municipality was not only unable to adopt a new form of organization which might better satisfy its needs, but could not exercise any function whatever without specific permission from the state legislature. Previously to 1902, this restriction had been easily met and alleviated by the passage of laws affecting only a single city. After the crisis of 1902, and the change of position by the supreme court, this was no longer possible, and any power which a city might desire in addition to those granted by the code, could be obtained only by a general law applicable to seventy-one other cities.

As was generally foreseen, the code of 1902 proved inadequate and constant amendment and supplementing was necessary. During the first session after the code went into effect, forty-five such acts were passed.⁽³⁾ Many of these concerned such matters as the licensing of

(1) See Judge Cooley,

(2) Collins v Hatch, 18 O.S. 523; See also; -

Ravenna v Penn. Co., 45 O.S. 118, (1887)

Bancroft v Wall, 29 B. 306.

Gas and Water Co. v Elyria, 57 O.S. 374, (1897)

State v Carter, 67 O.S. 422,

(3) 97 Ohio Laws (1904).

pawn-brokers, scavengers, livery stables, and junk shops. At the next session, sixteen supplementary measures of this kind were passed ,
 (1)
 (2)
 thirty-three in the next session , and two in the special session of 1909.

To illustrate the nature of this legislation, Cleveland wished to build a public bath-house, but could not do so under the powers enumerated in the code. It was necessary, therefore, to secure from the legislature the passage of a law giving the cities of the state the
 (3)
 power to construct municipal bath-houses.

Akron attempted to collect a license from the owners of vehicles for the improvement of streets, but the supreme court declared the ordinance void, on the ground that while the code permitted the regulation of traffic, it did not permit the raising of revenue therefrom.

An extreme instance of this restriction upon municipal power and its effect upon the work of the legislature comes from Springfield. That city wished to prohibit the blowing of whistles within its limits, but found itself unable to do so in the absence of an express grant of such power. A law was soon passed, however, permitting the seventy-two cities of the state to prohibit the blowing of whistles
 (4)
 within their limits.

Other laws, whose nature seems to indicate that they were passed in response to demands from certain localities, permitted municipalities to grant the use of streets for inclined, moveable, or rolling
 (5)
 (6)
 roads, and authorized the repair of the tow-paths of canals.

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- (1) 98 Ohio Laws (1906).
 (2) 99 Ohio Laws (1908).
 (3) 100 Ohio Laws, 53 (1910)
 (4) 99 Ohio Laws, 5. (1908)
 (5) 99 Ohio Laws 7. "
 (6) 102 Ohio Laws 468, (1911)

The necessity of detailed legislation is well illustrated by the large number of laws on a single subject, as, for example, street-sprinkling. The code of 1902 gave to the municipal council the "care, supervision, and control of all streets".⁽¹⁾ In 1904, an amending law gave it "authority to sprinkle with water, sweep, and clean" the streets.⁽²⁾ Two years later, this function was further provided for by a law granting "municipalities the right to require street railway companies to sprinkle their right of way", while an additional law authorized assessments therefor.⁽³⁾ These earlier law-makers, however, had not foreseen the advantages of oil over water, and in 1906 it was thought desirable, in order to take advantage of improved methods,⁽⁴⁾ to permit municipalities to sprinkle streets and avenues with oil.⁽⁵⁾ The act was amended slightly in 1908, and in 1911 a definition of the word "owner", as used therein, was added.⁽⁶⁾

Legislative acts granting municipal licensing powers were equally voluminous. After a score or more of such measures had been passed during the first few years of the code, it was found necessary to pass an additional act in 1910, entitled "-- to provide for the licensing of manicures, masseurs, and chiropodists".⁽⁷⁾

In all of these instances, the general application of the law to all cities was carefully maintained. Two acts of 1911 offer a rather noticeable exception to this, and seem to belong in the period before 1902. These laws exempted from certain tax provisions all property in a "municipal corporation when the limits of such municipal corpora-

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- (1) Section 28.
 (2) 97 Ohio Laws 162, sect. 65.
 (3) 98 " " (1906)
 (4) 98 " " 50. "
 (5) 99 " " 587. (1905)
 (6) 102 " " 304.
 (7) 101 " " 232.

tion are identical and coextensive with the limits of an entire island".
(1)

A report of the Municipal Association of Cleveland cites a list of functions whose exercise was attempted by Cleveland but prevented by the lack of specific authorization. They include;-
(2)

the regulation of the speed of automobiles;

the control of the use of the subsurface of public highways as a means of obtaining revenue;

the prevention of the disfigurement of streets by signs and advertisements;

the regulation of the architectural appearance and character of buildings fronting upon a public highway;

the manufacture of ice for charitable distribution;

the prevention of the invasion of residence districts by industrial establishments;

the expulsion of chickens and other noise-making animals, as well as dogs.

It was the necessity of providing for such local matters as these that had caused much of the "special" legislation prior to 1851, and of legislation virtually special from 1851 to 1902. The new code and the strict interpretation of the courts had not changed conditions vitally. The most apparant difference was that after 1902 these individual and local needs were met by general laws which applied equally to all municipalities of the state without classification or limitation.

It must not be thought, however, that the new system was in no way an advance on the old regime of special legislation. The opposite

(1) 102 Ohio Laws 178 and 191.

(2) Constitutional Home Rule for Ohio Cities, p. 16.

is true. The rule of uniformity not only discouraged legislative discrimination against a single city, such as has been shown in the case of Cleveland or Toledo, but also extended the benefits of any particular measure to all other municipalities. The effect was to lessen the work of the legislature and at the same time increase the scope of power of the average city or village. The decade following 1902, then, marks a step forward ; but it does not furnish the solution of the proper relation of state and municipality.

A Wrong Theory of Municipal Government.

The criticisms which have made of special legislation may also be applied to this system of uniform legislation under general laws. There is still a waste of legislative time and money in the consideration of purely local interests; there is still an opportunity for log-rolling and hasty,unintelligent legislation;and the interference of state and national politics in municipal affairs is not yet eliminated. Nor are these criticisms merely theoretical. The testimony of members of the legislature goes to show that at least one-third of its time during this period was consumed in the consideration of municipal bills. (I) The state interference in local affairs was best illustrated,perhaps, in the operation of provision of the code which authorized the governor to appoint the board of safety of a municipality when the mayor's nominations were not approved within thirty days by two-thirds of the council. This measure did not fail of its purpose, and within six years, fourteen boards were appointed wholly or in part, by the governor.

(I)Constitutional Home Rule for Ohio Cities,p.18.

The following table will suggest to what extent political influences may have been involved in the operation of the provision.

Appointments by Governor to Municipal Boards of Safety, 1902-12.

Year	City	No. app'ted.	Party affiliations of :-		Governor.
			mayor	council	
'03	Hamilton	4	#	#	Republican
'03	Fostoria	2	Republican	Republican	"
'03	Middletown	2	Democratic	Democratic	"
'03	Findlay	2	Democratic	Republican	"
'03	Toledo	4	Independent	"	"
'03	Painesville	2	Republican	Democratic	"
'03	Warren	2	"	Republican	"
'03	Lorain	2	Democratic	"	"
'03	Van Wert	4	#	#	"
'06	Dayton	1	Democratic	Republican	Democratic
'06	Piqua	1	Republican(dry)	Republican(wet)	" (dry)
'06	Ashtabula	1	#	#	#
'06	Chillicothe	2	#	#	#
'08	Defiance	1	#	#	Republican

#No data available.
(1) Appointee was a "dry" Republican.

Attempts at Reform through Municipal Legislation.

Not only was the rule of uniformity proving objectionable from the standpoint of legislative efficiency, but looked at from the side of the municipality, it was not conducive to efficiency or progress. Pioneer work in city government was made impossible. Development of municipal functions was hampered by the narrow limitations upon the power of the cities, while at the same time was prevented the growth of that feeling of responsibility and civic independence which comes only with freedom of action. While the fundamental objections were based not upon the code itself, but upon the theory of government which it represented, there were several attempts to find relief in alterations of its provisions.

The first of these important changes was aimed at the close relation which had existed between state and municipal politics.

In the code as originally passed, municipal elections, which were then annual, were placed in April, in order to keep them distinct from those of the state. (1) A law of 1904 repealed this provision and re-established the November elections for both state and municipalities. (2) The objection to this arrangement led in 1906 to further change. Municipal elections were made biennial and placed in the odd years. (3)

Another movement looking towards greater efficiency in city government, had been started previous to the framing of the code. In May, 1902, the legislature passed the first of a series of uniform accounting measures. (4) Under it, the same system of accountancy was applied to all county and other local offices, while at the same time, there was established a bureau of inspection and supervision. The National Municipal League had previously drawn up a plan of uniform accounts, and this was now adopted by the bureau. These measures were further supplemented in 1910.

The most effective municipal legislation of the period appeared in 1908, with the passage of the "Paine Law", so called from its sponsor, Mr. Louis H. Paine of Toledo. (5) Its purpose was two-fold, to reorganize the government provided by the code of 1902, and to furnish an adequate civil service system. Towards the first end, the boards of public service and safety were abolished, single directors, appointed by the mayor, being substituted. To the director of public service was given the management of all municipal light, heat, and water plants, and the supervision of streets, alleys, sewers, public build-

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- (1) Section 222.
 (2) 97 Ohio Laws 37.
 (3) 98 " " 171, sect. 222.
 (4) 95 " " 511.
 (5) 99 " " 562-8.

ings of all kinds, cemeteries, parks, and markets. Under the director of public safety were placed the departments of fire, police, charities and corrections, and buildings. The mayor and the two directors were constituted a board of control, with the mayor as president. All contracts from any department involving over \$500,000 were made subject to the approval of this board, while contracts of less amount were to be made at the responsibility of the director in whose department they belonged. The budget was to be drawn up by the board of control and be submitted by the mayor.

It will be noticed that the Paine law embodied all the essentials of the federal plan of government, which had proved so successful in Cleveland under a Democratic mayor, and which had been rejected by the legislature in the special session of 1902. The debates of that session indicate that the federal plan of city government was closely associated in the minds of the Republican legislators with Democratic rule, and for this reason an unprejudiced consideration of its merits was made impossible. But the law of 1908 was passed by a legislature of which both houses were Republican, and under a Republican governor. (1) This change of attitude is possibly best explained by the urgent need felt by all cities for a simplification of the code provisions, and by the fact that six years of uniform government throughout the state had removed the main grounds for the Republican opposition to the federal plan.

In respect to its civil service provisions, the Paine law was a distinct advance on any previous legislation of the state. Prior to 1902, the merit system had had no place in the municipal government of Ohio cities. Under the code of that year, nominal and very limited provisions for such a system had been made, but with no adequate

(1) Lieutenant-governor Harris (Repub.) followed Gov. Pattison (Dem).---

machinery to make it effective. The law of 1908 divided all municipal offices into the classified and unclassified service, the latter including departmental heads, positions requiring peculiar skill or confidential relations, and others which could not properly be thrown open to competition. For all appointments to the classified service, examinations were made obligatory, these to be administered by three civil service commissioners appointed for three years by a commission composed of the president of the council, board of education, and sinking fund, and all appointees being chosen from the three highest on the list of eligibles.

These changes in the code introduced greater simplicity and centralized responsibility. Especially is this noticeable in the increased importance of the mayor. For six years he had been little more than a figure-head, with small appointive powers and no effective control of the executive departments. Under the Paine law, the mayor appointed not only the two important directors of safety and service, but also their sub-departmental heads; and as president of the board of control, he exercised a unifying control over all the administrative functions of the city.

The greatest criticism of the law lies in the fact that it failed to carry its reform far enough. No change was made in the existing provisions for partisan nominations and elections; and the number of elective officers remained too great in spite of the abolition of the two boards. The councils in the larger cities were still too large for efficient operation, Cincinnati and Cleveland having in the neighborhood of thirty councillors; while their election at the same time was not calculated to produce continuity in service. The criticism may also be made that the merit system provisions were not extended

(I)

far enough. On the whole, however, the new law furnished an organization more nearly suited to the needs of all the cities of the state, while making possible greater efficiency and economy in their operation.

Preparations for Constitutional Change.

Throughout this decade, a movement for a new constitution was growing. Back in 1898, the legislature had passed a bill for the sub-⁽²⁾mission of the question of a constitutional convention, but a vote was never taken as the Supreme Court found the measure defective in construction.⁽³⁾ In 1909 a similar bill was passed⁽⁴⁾, and the elector⁽⁵⁾ate ratified the proposal in November, 1910. Before the vote was taken, the Municipal Association of Cleveland issued a bulletin in which⁽⁶⁾ were stated the three greatest needs for a constitutional convention. These were:-

(a) Tax Reform. The constitution of 1851 required a uniform tax on all property at a true valuation, but gross inequalities had crept in. By the tax duplicate of 1907, real estate paid over 67.7 percent, a condition which the commission of 1908 reported as so "manifestly wrong and inimical to good government that its longer continuance is a grave injury to the state"

(b) Municipal Home Rule. The demand for this had been enhanced by the desire of some cities to establish commission form of government.

(c) Administrative Reform. A strong public opinion demanded the abolition of the justice of the peace courts, and further centraliza-

(1) J.R. Schindel, "The Paine Law in Ohio", Conf. Good City Gov't. 1909, 249.

(2) 92 Ohio Laws 787.

(3) 56 O.S. 721

(4) 100 Ohio Laws 18.

(5) Total vote, 932,262; for convention, 693,263; against, 67,718. Patterson Constitution, p. 299.

(6) vol. 14, no. 3.

tion of administration, changes which could not be accomplished under the old constitution.

While the large vote on the question of the convention seems to indicate a greater popular interest than on any previous vote of a similar nature, such an inference is not justified by the mere figures because of the changed conditions under which the vote was taken. By an amendment to the act of submission, passed April 26, 1910, it was provided that if any political party should take favorable or unfavorable action regarding the question, in its state convention, the ballot would be so arranged that a straight party vote would sustain the action of the party. Both the Democratic and Republican parties endorsed the proposal, so that, as a result, all party votes were counted in its favor.

Justice Donahue of the Supreme Court said in a later case, "The conferring of home rule upon municipalities was not the only purpose of the constitutional convention. Many other matters of equal importance induced the call for a constitutional convention, and principal among these other matters was the desire on the part of the people of the state to abolish political conventions and to establish in their stead uniform methods for the nomination of elective state, district, county, and municipal officers."⁽¹⁾

Immediately following the ratification of the proposal, the Cleveland Municipal League, then become the Civic League, appointed a committee to investigate municipal conditions and prepare material bearing upon the subject. The result of its work was published as a thirty-four page pamphlet, which briefly reviewed the history of municipal legislation and the attitude of the courts, diagnosed the pre-

(1) Fitzgerald v Cleveland, 103 North East Reporter, 527 (13)

sent ills, and proposed Home Rule as a remedy. This pamphlet was widely circulated and did much to crystalize public sentiment and lead to a general understanding of the principle involved.

In the meantime, the Home Rule forces throughout the state were preparing for the convention. Early in 1912, a conference was called to consist of representatives from all of the cities of the state, for the purpose of preparing recommendations for the convention, and discussing the advisability of organizing a state municipal league. (1)
On January, 24th, the conference convened in Columbus, with 153 delegates from 53 cities. (2) The sentiment of these men was expressed in the unanimous resolution "that this conference expresses its firm belief that the only effective and permanent relief for our cities from the evils of legislative interference is to be found in the adoption of the principle of home rule.---Resolved that we respectfully and earnestly request the constitutional convention to incorporate into the new constitution provisions whereby the authority to frame their own charters and to exercise the fullest power of local self-government will be granted to the cities." (3)

To put this in the shape of a definite recommendation, a committee of twenty was appointed. Two draft plans were submitted by it to the conference, one by Professor A.R.Hatton, representing the majority, and one by Mr.A.J.Freiberg and the other Cincinnati delegates, the difference being largely one of wording. The former was accepted by all but the Cincinnati delegation, and a committee of fifteen appointed to present the proposal of the conference to the convention.

At the same conference, the organization was completed of the

(1) Cleveland Municipal Bulletin, Dec., 1913.

(2) Ibid.

(3) Complete Text in National Municipal Review, April, 1912.

"Ohio Municipal League". This body immediately took up the campaign for Home Rule. It was appropriate that the head of the new League should be Newton D. Baker of Cleveland, the mayor of the city which had suffered most acutely under the political interference. the ill-considered legislation, and the cramped municipal powers of the old regime.

Chapter V.

Home Rule and the Constitutional Convention of 1912 .

The Fourth Ohio Constitutional Convention assembled in Columbus on the ninth of January, 1912. Seventy of the one hundred and nineteen delegates came from the cities of the state, while the five largest municipalities, Cleveland, Cincinnati, Toledo, Columbus, and Dayton, contributed all together twenty-five members. This high proportion of municipal representatives in the convention is significant of the change which had taken place in the predominant interests of the state. In the convention of 1850, the five largest cities were represented by only thirteen of the one hundred and eight delegates, and the small proportion of these coming from all municipalities indicated the agrarian complexion of the state. (1) Thirty percent of the members of this earlier convention were farmers, while over fifty percent of the males of the state were recorded in the same class. (2) The rapid growth of cities was just beginning. Cincinnati had doubled its population in the preceding decade, and then numbered 115,000 population, but Cleveland and Columbus were towns of 17,000; and Toledo, destined to be the fourth city of the state in 1912, was still below the 4,000 mark. (3) In view of this predominance of agricultural interests, it is not surprising to find the convention of 1850 attacking the municipal problem from the outside rather than from within, considering the city largely in the relation of its demands upon legislative time and expense rather than from the standpoint of its problems of internal government, while at the same time giving evidence of a strong sentiment against corporations of any kind. (4)

(1) i.e. municipalities over 5,000 population.

(2) Organic Law of Ohio, published by Board of Library Comm'rs.

(3) Seventh U.S. Census.

(4) See supra p.3.

When the convention of 1912 came together, the population of the state had undergone a radical change in character. Over two and one-half millions of its people were living in municipalities over 2,500 population, or approximately sixty percent of its total population. Only twenty-one percent were engaged in farming. Cleveland had passed the half-million mark; Cincinnati, Columbus, Dayton, and Toledo, each contained over 100,000. Municipal government was therefore more than an item on the docket of the convention; it was a problem in which the delegates were vitally interested, and that not merely because of its relation to other branches of state activity, but because of the importance of its internal problems in the life of the state.

Proposals before the Convention.

Six Home Rule measures were introduced and referred to the committee on municipal government. These varied widely in the extent of self-governing power granted to the municipalities and the degree of control retained by the state.

Mr. Ulmer of Toledo (Lucas) offered a bill providing that "Every municipality shall have the fullest measure of home rule --- and may⁽¹⁾ adopt any form of government they may select".

In the proposal of Mr. Evans of Portsmouth (Scioto), a similar grant of charter-framing power was qualified by the specification that "in each city there shall be a legislative body, elected by the⁽²⁾ people, which shall control the finances".

Mr. King of Sandusky (Erie) limited his proposed grant of home rule power to the choice by each municipality of "its own system of administrative government by a vote of a majority of the electors", together with the power to exercise a local veto on any law passed by the

legislature subject to the vote of a subdivision of the state.

A fourth proposal concerned the local framing of charters but contained no further grant of governmental power. (2)

The two remaining measures presented the most carefully planned and comprehensive provisions for Home Rule. Both had had their source in the January convention of Ohio municipalities. One represented the majority sentiment and especially that of the Cleveland delegation, while the other expressed the dissent of the Cincinnati delegation. (3) The feature which distinguished these measures from the others introduced was the grant to municipalities of "all powers of local self-government".

The limitations upon municipal power varied widely in the different proposals. In two, the charter was made subject to state laws ; a third made an exception to this in the case of municipal affairs; another stipulated the superiority of "general laws affecting the welfare of the whole state". In two, it was provided that no conflict between municipal and state law should be recognized unless the "General Assembly, by general law, shall have specifically denied municipalities the right to act thereon." Another measure made charters subject to approval by the legislature, while still another, not directly concerned with Home Rule, vested in the legislature the power to amend or repeal all rights conferred upon corporations.

The committee on municipal government held over two dozen meetings, in which were eliminated from consideration all but the two proposals of the Municipal League. Its final action supported in all essentials the bill introduced by Mr. Fitzsimons of Cleveland, representing the majority of the cities of the League.

(1) Proposal no. 128.

(2) " " 138.

(3) " s nos. 272 and 279, respectively.

The features of this measure, commonly referred to as proposal
(1)
no.272, were as follows;-

- (a)the separation of cities and villages at the 5,000 population line;
- (b)a provision for general laws for the incorporation and government of municipalities, and for special laws, subject,however, to a local referendum;
- (c)a broad grant to municipalities of the power to frame a charter and "exercise thereunder all powers of local self-government", such charter to be subject to the laws of the state except in municipal affairs, and all police, sanitary and other regulations to be subject to general laws;
- (d)provisions for the ownership and operation of public utilities
- (e)state control in the matter of finances.

As reported from committee to the convention, the proposal contained an additional section permitting excess condemnation of land.
(2)
Professor Knight, in reporting the measure, said, "The proposal undertakes to accomplish three things not now possible under the present constitution;

(1)A comparison of the two proposals reveals differences on some important points. For example, in #272, charters were subject to general laws except on municipal affairs, while in #279 only "general laws affecting the general welfare of the whole state" were paramount. Public utility provisions were more comprehensive in the former measure, including provisions for the sale of such service, and the issue of bonds in excess of the debt limit, with the property and revenue of the utility as security. Another provision of #272 not found in #279, was that for financial reports from cities and the examination of their accounts. It would hardly be correct to say, then, that "the only difference was as to the wording of the provisions". (See National Municipal Review, April, 1912, p.284.)

(2)Debates, II, p.1433.

"First, to make it possible for different cities in the state of Ohio to have if they so desire, different forms and types of municipal organization,-- to frame charters for themselves, to provide each for itself such type or form of organization for municipal business as it desires;

"Second, to get away from what is now the fixed rule of law,-- that municipal corporations--shall be held strictly within the limit of the powers granted by the legislature to the corporation,-- and to provide that municipalities shall have the power to do those things which are not prohibited.

"Third, to make broader the power of municipalities to control the water supply, the lighting and heating supply, and the other things without specification which come within the purview of municipal public utilities.

"These three things taken together certainly constitute what may be termed, and rightly termed, municipal home rule."

It is doubtful if any measure roused more bitter antagonism and heated debate than the question of Home Rule. The influence of the liquor lobby was felt to be strong in the convention, and its work was feared in this, as in most of the other measures under consideration. Another source of opposition was the public utility interests, who saw their power threatened by the municipal ownership provisions. Added to this hostility to the general principle involved, was a disagreement among the supporters of Home Rule as to the exact form it should take, and the probable effect of the proposed measure.

It is not the purpose of this chapter to follow out in detail the entire history of proposal no. 272 in its passage through the convention. The consideration of fundamental importance is the final form in which it appears in the constitution, not the temporary forms it

assumed on the floor of the convention. Nevertheless, it will be of profit to notice the action taken upon those sections of the measure which have to do particularly with the grant of Home Rule power, and upon which the constitutionality of later municipal action will largely depend.

(1)

As reported from the committee, it contained these sections;

"3. Municipalities shall have power to enact and enforce within their limits such local police, sanitary, and other regulations, as are not in conflict with general laws, affecting the welfare of the state as a whole, and no such regulation shall by reason of requirements therein, in addition to those fixed by law, be deemed in conflict therewith unless the general assembly, by general law, affecting the welfare of the state as a whole, shall specifically deny all municipalities the right to act thereon.

7. Any city or village may frame, adopt, or amend a charter for its government, and may exercise thereunder all powers of local self-government; but all such charters and powers shall be subject to general laws affecting the welfare of the state as a whole."

The adoption of these sections would reverse the previous position of the city. Instead of possessing only those powers specifically delegated by the legislature or constitution, it would have all those powers not specifically denied to it. The presumption, formerly against the city, would be in its favor. (2) Section 3 was copied in substance from the California constitution, with the ambiguous term, "except in municipal affairs", omitted, and with the addition of a definition of what constitutes a conflict, practically as interpreted

(1) Journal, p. 482.

(2) Article XI, sect. 11.

by the California courts.

The phrase, "affecting the welfare of the state" was ambiguous, and it was feared by the "drys" that restrictive liquor laws might not come within its meaning. Another proposal before the convention and later passed, ⁽¹⁾ permitted the grant of liquor licenses, subject, however, to the operation of local option laws. If the latter should be considered by the courts as not laws affecting the welfare of the state, the city could under section 3 as reported, permit the sale of liquor although the county in which it lay had prohibited the same. ⁽²⁾ A basis for this fear was found in a decision of a California court.

To remove this danger, it was proposed to add a specific prohibition of the use of police power by a city with reference to the sale of liquor. ⁽³⁾ This was defeated, as the friends of the measure felt that its success might be jeopardized by ^{any} provision openly relating to the wet and dry fight. The objectionable phrase, "affecting the welfare of the state", was then stricken out in both section 3 and 7, together with the remainder of section 3. ⁽⁴⁾ In its place was proposed an amendment making such police, sanitary and other regulations subject to general laws "except in municipal affairs". This was also defeated.

It will be noticed that thus far the general grant of powers to municipalities, aside from those to be exercised under new charters, was confined to the limited exercise of certain specified regulations. This provision was now amended under a motion by Professor Knight, to give municipalities "authority to exercise all powers of local self-government". This amendment, he said, "puts both kinds of municipalities (those adopting charters and those not doing so) upon the same

(1) Proposal no. I5I, later Art. XV of schedule.

(2) I55 Cal. 304.

(3) Debates II; p. I462 ff.

(4) Ibid p. I474.

footing, so that those who shall operate under general laws shall have authority to exercise all powers of local self-government, and enact and enforce within their limits such local police, sanitary, and other regulations as are not in conflict with general laws. The same provision is in section 7." ^(I) Section 7 was then reworded, and the two provisions granting Home Rule power assumed the form in which they were finally adopted. They then read;

3. Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other regulations as are not in conflict with general laws.

7. Any municipality may frame and adopt or amend a charter for its government, and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

The term, "provisions of section 3," referred to in section 7, has reference apparently to the limitation contained in the phrase, "as are not in conflict with general laws". The question has arisen as to whether these words limit the entire section or merely the second part. In the former case, municipalities could exercise only those powers of local self-government which did not conflict with general state laws; in the latter case, merely their police, sanitary and other regulations would be subject to this restriction.

A careful examination of the debates on this subject indicates that in the minds of the leaders of the discussion, this limiting phrase applied to the entire section. Professor Knight, whose amendment gave the final form to section 3, stated that he wished to place

cities operating under it "upon the same footing" with those who framed charters under section 7, but at the time when he spoke and when his amendment was adopted, section 7 specifically provided that the "charters and powers", meaning all powers of local self-government, "shall be subject to general laws". These two sections, said Professor Knight, "do not vary at all in sense or substance".

More conclusive evidence, however, is furnished by the direct action of the convention itself. The ambiguity in the meaning of section 3 was caused by the absence of a comma between the two parts of the sentence. For that reason, it is interesting to note that Mr. Fitzsimons moved to insert a comma after "self-government", asserting that this change would not enlarge or curtail the powers then granted by the section. (1) By ordinary rules of construction, nevertheless, such a change would clearly limit the modification of the last clause to the words found after the comma. This was at once seen, and vigorous opposition arose. Mr. Winn of Defiance, who had proposed the final wording of section 7, objected that the placing of a comma at this point would take away all restrictions upon the local self-government powers of the municipality. (2) He added, "It is proposed to insert a comma after self-government so that the municipality shall have authority to exercise all powers of local self-government without any restraint by the general laws of the state. Do you get that?" "That is what they ought to have", retorted Mr. Doty. With the issue thus clearly drawn, the motion to insert a comma was defeated by a vote of (3) 67 to 42.

It is not the purpose here to overrate the significance of this action. Certainly it does not establish beyond a doubt that the sixty six members of the convention who voted with Mr. Winn, shared his con- (1) Ibid, II; 1861. (3) Ibid, II; 1861. (2) "That amendment (final word-

viction that as the proposition then stood, all powers of local self-government were subject to general laws. Nevertheless the fact that so large a majority refused to support an amendment which would have clearly established the negative, creates a supposition to that effect. In preventing the insertion of a comma, the convention either wished to maintain the limitations of state laws upon local government, or to leave the section in such a form as to make its exact meaning doubtful. The record of the debates offers no serious grounds for the latter assumption.

On the twenty-eighth of May, proposal no. 272, as amended, passed the convention by a vote of 99 to 14. Three days later, after minor changes, it received a final vote of 95 to 8.
(1)

Further Provisions for Home Rule.

As has been indicated, the opposition to Home Rule measures in the convention came largely from the anti-saloon and the public utility interests. The former had effected a change in ^{the} proposal passed, in the interests of state control of the liquor traffic. The latter, seeing their power jeopardized by the municipal ownership provisions, sought to surrender under as favorable conditions as possible.

In its original form, proposal no. 272 provided that;-

ing of section 7) was offered and agreed to and written into the proposal because in section 3 there was no comma after the word self-government. You see the importance of all this, so if we now insert a comma after the word "self-government", and thereby limit the right of municipalities by general laws to only such things as relate to local police, sanitary, and other regulations, then we have in section 7 the same unrestricted right on the part of municipalities to adopt a charter, that was not intended. Such was not understood to be the sense of the convention when the amendment to section 7 was offered and adopted."

"Any municipality may acquire, construct, own, or operate within or without its corporate limits, any public utility the product or service of which is (or is to be ⁽¹⁾) supplied to the municipality or its inhabitants-- by condemnation or otherwise.

"Any municipality -- may also sell and deliver such product or service to others in an amount not exceeding fifty percentum of the total product (supplied within the municipality ⁽¹⁾);

" may issue mortgage bonds therefor, not to be included within the limit of bonded indebtedness prescribed by law; but bonds so issued shall not impose any liability upon such municipality but shall be secured upon the property and revenues of such public utility" including a franchise for not more than twenty years from date of sale.

The first clause quoted extended the right of municipal ownership to street railways and telephones, as to which there was some doubt under the existing constitution. ⁽²⁾ Several attempts to modify it were made in the interests of the privately owned utilities. The first of these was an amendment proposed by Judge King of Sandusky, to the effect that "any such public utility shall be subject to any regulations provided by law for a public utility of the same class owned or operated by any person, firm, or corporation." ⁽³⁾ A second amendment proposed to set a minimum rate for such utility service at the cost of production. ⁽⁴⁾ Still another attempt to change this section grew out of the protest of the "interests" that this power would enable the city to enter into competition with a privately owned utility ~~company~~, depreciate its value, condemn it, and take it over at a reduc-

(1) as added in committee.

(2) Debates II; I444.

(3) Ibid, I482. Defeated by a vote of 85 to 18.

(4) Mr. Hoskins, Ibid, I491. This motion was tabled.

ed valuation. To prevent this, Mr. Lampson of Ashtabula, proposed that any municipality determining to construct any public utility shall provide against the waste of competition, by first acquiring by condemnation or otherwise, the property of any existing utility used and useful for the convenience of the public in furnishing a like service in such municipality". Here again was seen "the fine Italian hand of the public service corporation", and the motion was tabled.

Without further attempt at important modification, these provisions were adopted with the rest of the article.

There must be mentioned two important additions to this proposal which were made by the committee on municipal government. The first permitted any municipality acquiring property for public use, to appropriate an excess amount and pay for the same by an issue of municipal bonds, such bonds, however, to be a lien only upon the property acquired, and not to be included in the state limitation upon the bonded indebtedness of the city. This is the first comprehensive provision for excess condemnation in a constitution of one of the United States.

(1) Debates, II:1862.

(2) Section 12, i.e., the provision for mortgage bond issues for the payment for utilities, is almost an exact copy of article 8, section 24, of the Michigan constitution adopted in 1908. Municipal ownership of public utilities is more restricted under the Michigan constitution than under that of Ohio, being specifically limited to water, light, heat, power, and transportation, on a three-fifths vote of the electorate, including women, (section 23, 25), and with the further limitation that municipalities under 25,000 are denied the right to own or operate transportation facilities. The sale of public utility service outside the municipality is limited to an amount not exceeding 25% of that furnished within its limits. Further provisions forbid the grant of irrevocable franchises without a three-fifths vote (including women tax-payers), and reserve to municipalities the reasonable control of the streets and public places (section 28).

(3) See report of the committee, Debates, II:1313.

(4) See Massachusetts Constitution, Art. XXXIX; and Concurrent Resolution I, 135th Session, New York Legislature, (1912).

The second addition was the authorization of assessments upon abutting property for the purchase of private property for public improvements, with the limitation that such assessments should not exceed the benefits conferred. Up to 1902, it had been the practice in Ohio to assess benefited property to pay the cost of opening streets, but in that year the supreme court overthrew a long line of decisions, and held that,

"The limitation of section 19 of article I of the constitution on section 6 of article 13 as to assessment, goes to the full extent of prohibiting the raising of money directly or indirectly by assessment to pay compensation damages or costs for lands appropriated by the public for public use."⁽¹⁾

Further amendment of this clause extended the scope of the possible assessments to "benefited" rather than "abutting" property, and limited the amount thereof to fifty percent of the cost of appropriating the land.

One other restriction upon municipal power remains to be noted, namely the reservation to the state of power to limit municipal taxes and debts, require uniform financial reports, and to examine all accounts.⁽²⁾

On May thirty-first, the Home Rule measure received the final vote of the convention. On the twenty-sixth of August, the Fourth Ohio Constitutional Convention adjourned sine die.

(1) Dayton et al. v Bauman, 66 O.S. 397.

(2) Originally found in two sections, but later combined as section 13.

The Ratification of Home Rule by the Electorate.

In the meantime, the public utility interests had begun a state-wide campaign to defeat Home Rule at the polls. Thousands of farmers were supplied with literature of a misrepresenting nature, calculated to create an impression that Home Rule would lead to municipal ownership of public utilities, their consequent removal from the tax list, and an increased burden for the farmer to bear. Arguments of a different nature were used with other classes of voters. Truck gardeners and dairymen were threatened with municipal competition in their respective fields, and conservatives were warned of the danger in this overthrow of the accepted theory of municipal government. (1)

But the movement had gathered too great a momentum to be stopped by such opposition, and ^{on} the third of September, the electorate accepted the amendment by a vote of 301,861 to 215,120. (2) It thereby became article 18, heading "Municipal Corporations", of the state constitution. The following table will serve to indicate more clearly the exact scope of the powers granted to municipalities, as well as of the limitations thereon.

Article 18.

<u>Powers granted municipalities.</u>	<u>Limitations upon municipal power.</u>
2. May adopt "additional laws" passed by the state legislature.	
3. May "exercise all powers of local self-government and	
adopt and enforce within their limits such local police, sanitary and other regulations--"	"as are not in conflict with general laws".

(1) Mr. Mayo Fessler reports that at least ten sets of literature were sent out by these interests, National Municipal Review, Oct. 1913, p. 714.

(2) Constitution of the State of Ohio, issued by Ch. H. Graves, 1913, p. 83.

(3) Complete text of Article 18 in appendix A.

4. May acquire and operate public utilities----- but must act by ordinance, which is subject to a referendum vote within 30 days, on petition of 10% voters.
- 5.
6. May sell public utility service in amount not over 50% of that used by itself.
7. May "frame and adopt or amend a charter for its government, and may ----- subject to the provisions of section 3 of this article
- exercise thereunder all powers of local self-government.
- 8,9. Charters may be framed and amended ----- under specified regulations.
10. May appropriate an excess amount of land, paying therefor by bonds, which shall not be a liability of the municipality. Bonds to be a lien only upon property acquired.
11. May assess benefited property to pay for private property taken for public improvement. Assessments not to exceed 50% of cost of appropriation, nor to exceed the special benefits conferred.
12. May issue mortgage bonds beyond the debt limit, for the acquisition of utilities. Such bonds to be secured only upon the utility, including a franchise for not more than 20 years from sale.
13. State may limit municipal taxing and borrowing powers, require financial reports, and examine all accounts.
14. All elections and submissions of questions to be conducted by authorities prescribed by law.

A Comparative Study of the Vote on Home Rule.

Article 18 was not the only fruit of the convention's labors. At the September elections were submitted forty-two proposed amendments. Of these, thirty-four were ratified by the people. An examination of the votes cast on each of these measures will be of value in indicating the relative prominence of Home Rule at this election; while a somewhat detailed study of the vote on article 18 will furnish fairly

accurate evidence of the location of the Home Rule sentiment.

With regard to the first point, it is significant that, while article 18 was voted upon by 516,981 persons, twenty-four of the forty-one other measures called forth a larger vote, ranging as high as 586,295 in the case of the defeated woman suffrage amendment. Among the twenty-four, were such measures as those for the initiative and referendum, changes in civil and criminal procedure, voting machines, primaries, regulation of insurance, and of outdoor advertising, investigations by the legislature, and limitations upon the veto power of the governor. Eighteen proposals were ratified by larger majorities than that received by the Home Rule amendment, and of these thirteen belonged in the above class. In this latter category are found such controversial matters as workmen's compensation, the recall; others of a technical nature, such as one permitting the passage of laws to regulate the use of expert witnesses and testimony in criminal trials and another giving each house of the legislature certain powers of internal regulation. The fact that each of these measures called out a larger vote than article 18 seems to indicate that Home Rule came before the people as one of the less important issues at the September polls.

A partial explanation for these figures lies in the fact that this amendment was the fortieth in order on the ballot. While this position undoubtedly operated to restrict its vote somewhat, it will not explain why the thirty-eighth proposal, for the regulation of outdoor advertising, polled a larger vote; or the thirty-fourth, establishing the doubly liability of bank stock-holders. It may be noted that the twenty-fifth amendment on the ballot polled the largest vote with the thirteenth, second.

(I) All figures from Graves' Constitution of Ohio, Columbus, 1913.

Looking at the statistics of the vote on this particular measure, it is apparant that its support came from the largest cities of the state. Cuyahoga county, alone, (Cleveland), gave Home Rule an affirmative majority vote of 40,105 out of a total majority for the entire state of 86,741. On the other hand, of eleven counties which polled less than 2,000 votes each on this measure, eight voted against it, or, in the aggregate, 54.5% of the voters. Of thirty counties polling less than 3,000 votes, seventeen voted in the negative. In fact, if the vote in the counties containing the six largest cities had been eliminated, Home Rule would have been lost by a majority of over 2,000.

The important role of these municipalities in the adoption of the amendment, is indicated by the high percentage of affirmative votes in their respective counties.

Cuyahoga Co. (Cleveland)	----	83.6%	of vote, affirmative.
Hamilton (Cincinnati)	----	70.2%	
Franklin (Columbus)	----	64.3%	
Lucas (Toledo)	----	83.3%	
Montgomery (Dayton)	----	60.6%	

Average for the five counties-72.4%

Average for entire state ---- 58.3%

Although the strength of Home Rule lay in the cities, here also it seems to have attracted only a secondary interest. In Cuyahoga county, where we might have expected the largest vote, twelve other proposals were voted upon by a larger number, and nineteen received a greater affirmative vote. In Hamilton county, fifteen measures surpassed it in the size of their vote, twelve polling a larger affirmative vote.

Supplementary Legislation of 1913 .

Section 2 of article 18 of the constitution made obligatory the passage of general laws for the incorporation and government of cities and villages, and further provided that "additional laws may also be passed for the government of municipalities adopting the same". In accordance with the latter clause, the general assembly passed a municipal government act in April, 1913.⁽¹⁾ The provisions of the law fall into two groups; first, the outlines of three optional forms of government, the commission plan, city-manager plan, and the federal plan, either of which may be adopted by a municipality at an election petitioned for by ten percent of the voters, or called by the legislative authority; and second, a score or more general provisions applicable to all three plans.

(a) Commission Government.

The first of the three plans of government provides a commission of three (or five in cities above 10,000) elected at large for four years, vested with all municipal powers, including the appointment and removal of officers and the creation or discontinuance of departments, and made responsible for every every branch of the municipal government.

(b) City Manager Plan.

Under this plan of organization, there is to be a council of five (seven in cities over 10,000, nine in those over 25,000), elected as in (a), and vested with power to "pass ordinances, adopt regulations, appoint a chief administrative officer to be known as the city manager,"

(1) 103 Ohio Laws 767-786, passed April 28, 1913.

approve all appointments made by him, except as otherwise provided in the act, fix all salaries, appoint a civil service commission and all boards or commissioners created by ordinance."

The duties of the city manager are outlined as follows;-"to see that the laws and ordinances are faithfully executed; to attend all meetings of the council at which his attendance may be required by that body; to recommend for adoption to the council such measures as he may deem necessary or expedient; to appoint all officers and employees in the classified service of the municipality subject to the provisions of this act and the civil service law; to prepare and submit to the council such reports as may be required by that body, or as he may deem advisable to submit; to keep the council fully advised of the financial condition of the municipality and its future needs; to prepare and submit to the council a tentative budget for the next fiscal year; and to perform such other duties as the council may determine by ordinance or resolution."

(c) The Federal Plan.

Under the last of the optional plans, there is provided; a council of from five to fifteen members, elected at large in all municipalities below 10,000 population, and in those above, either at large or by wards, as the electorate may decide, with the specification that councils elected at large shall have a maximum size of nine, with a term of four years, while other councillors serve for two; a mayor elected for four years, with the veto and important appointive powers, and the following duties; "to see that the laws and ordinances are enforced; to recommend to the council for adoption such measures as he may deem necessary or expedient; to keep the council fully advised of the financial condition and future needs of the municipality;

to prepare and submit to the council such reports as may be required by that body; to appoint, whenever he deems it necessary, competent disinterested persons not exceeding three in number, to examine without notice the affairs of any department, officer, or employee, and the result of such examination shall be reported to his office, and also transmitted to him by (by him to) the council without delay; to perform such other duties as the council may determine by ordinance or resolution, not in conflict with the provisions of this article."

Other officers under the federal plan include a director of public service in charge of all municipal utilities, public ways, and buildings, and who takes the place of various trustees and commissions hitherto provided for under the code; a director of public safety over the police, fire, health, charities and corrections, and building inspection, made appointive and removable, as also the director of public service, by the mayor; a board of control composed of the mayor, auditor, and the two directors; a treasurer, and a solicitor.

A notable departure from previous practice is the provision that the mayor and heads of departments shall have seats in the council with power to take part in its deliberations, and, in the case of the mayor, to introduce ordinances.

General Provisions.

The latter part of the law is applicable to municipalities which adopt any of the three forms outlined above. It contains provisions for the routine matters of government, minor offices, council investigations, a civil service commission chosen by the executive, the possible abandonment of the plan adopted after five years experience, the application of state initiative and referendum laws with the ad-

dition of a recall provision at the option of the voters. Under the last measure, all elective officers are made subject to recall at an election called by fifteen percent of the number of voters at the last general election. A commendable feature of this is the separation on the ballot of the two questions involved in such an election, namely the recall of the officer, and the election of his successor, a provision of the California recall which is preferable to that used in Oregon.

Chapter VI.

Home Rule Before The Supreme Court.

On the fifteenth of November, 1912, the Home Rule amendment of the constitution went into effect, and immediately the cities of the state began to take advantage of their enlarged powers. Cleveland led the way. In December, 1912, Mayor Baker appointed a committee of seven to nominate candidates for a charter commission. These nominees were elected in February, and in May the draft of a new charter was reported by the commission. But before this, Toledo had taken action to test the extent of its powers under the grant of "all powers of local self-government," in section 3 of the amendment.

Toledo Attempts to Exercise "all powers".

Acting under its old charter, the Toledo council passed an ordinance appropriating \$1,000 for a "municipal moving picture theatre", and directing the auditor to transfer this sum on his books from the general fund to that of the department of public service. The ordinance was declared an emergency measure and put into effect immediately. Auditor Lynch refused to make this transfer and furnish a certificate thereof, on the grounds (a) that Toledo did not possess the power to operate a moving picture show under the statutes of the state, and (b) that amendment 18, section 3, was not yet in effect in Toledo since that city had not adopted a charter under this article of the constitution. Suit was then brought by the city for a writ of mandamus to compel this action by the auditor, and the case went direct to the
(1)
supreme court.

(1) State ex rel City of Toledo v Lynch, City Auditor, 88 O.S. 71, May 6, 1913, (N.E. Reporter, Sept. 30, 1913).

The facts of the case are simple. Under section 3 of the Home Rule amendment, Toledo could "exercise all powers of local self-government". Acting under this authority, it had taken the first step towards the operation of a moving picture show. Against those who denied its competency to do this, the city must, in the words of Judge Shauck, "maintain the two propositions that without action by the General Assembly or the electors of the city, its council may 'exercise all powers of local self-government'; and that the suggested mode of entertainment is within these powers."

Both of these propositions were denied by the court.

Charter Necessary for Exercise of Home Rule Powers.

On the first point, Judge Shauck declared that section 3 of article 18 was not self-executing, since it conferred power upon the municipality but did not locate it in the council or other municipal organ, nor define the mode of its exercise. Cities under the amendment are therefore still subject to general laws of the state not inconsistent with its provisions, but two methods of escape from their operation are provided. "One of them is defined in the second section and manifestly it is not self-executing for it expressly authorizes the legislature to pass additional laws (subject to a local referendum). The other mode is defined in the provisions of the later sections relating to the adoption of charters. From the terms and nature of these later provisions, they are self-executing in the sense that no legislative act is necessary to make them effective.

"It seems therefore to be entirely beyond doubt that since the city of Toledo had not by a vote of its electors approved any additional laws passed by the General Assembly, and that its electors had not adopted a charter, the municipality and all of its depart-

ments have only such powers as were conferred by the general law, that is, such power only as it had prior to the 15th of November."

"Powers" Defined.

This point settled, no further argument was necessary to overthrow the contention of Toledo, since it based its entire case upon the section which was now declared non-self-executing. The court, nevertheless, took up the second point at issue, namely the question as to whether or not the power contended for by Toledo was within the scope of "all powers of local self-government". This phrase was defined by Judge Shauck as embracing "such powers of government as, in view of their nature and the field of their operation, are local and municipal in character. The force of the terms employed requires the inclusion of such powers to be exercised by officials, who in some manner and to some extent represent the sovereignty of the people. It as clearly excludes the exercise of functions which are appropriately exercised by caterers and impressarios." In this connection, another member of the court pointed out that "Nowhere in the original constitution of Ohio, nor probably in any of the last century state charters can we find the power of taxation employed for competitive enterprise in the hazard of profit and loss, or that such an enterprise is within the sphere of constitutional government according to the American idea".
(1)

To sum up, the court held section 3 of article 18 to be non-self-executing, requiring the adoption of a charter or the passage of further definitive legislation before the powers therein granted could be exercised by a municipality; and, moreover, that these powers granted

(1) Justice Wilkins' opinion.

are governmental only.

Justices Newman and Wilkins concurred with this opinion, and Justice Johnson agreed with the first part of it, i.e. the question of self-execution, and with the judgment. Justice Donahue concurred with the judgment but on different grounds. Justice Wanamaker entered a vigorous dissent.

Justice Wilkins put aside as irrelevant the question as to whether section 3 was self-executing, and based his opinion on the contention that Toledo had not assumed the powers conferred by this article. "There is no token on the record", he said, "that this municipality has chosen to avail itself of this grant of all powers of local self-government". The constitution offers but three ways of determining the form, character, and object of municipal government, namely general state laws, charters, and additional laws. "The city is still governed by the first method -- under general laws of the state. The maintenance of moving picture theatres is not a function of municipal government authorized by the General Code. Until the electors of the city adopt one of the other methods, no branch of the city government may divert the general funds to the business of managing moving picture shows for profit."

Justice Donahue, while concurring with the decision of the court, took direct issue with the grounds advanced by it as the basis of its conclusion. In his view, section 3 was an absolute grant of power, not dependent for its efficacy upon further legislative action. He said, "Undoubtedly it was the intention of this article to change the existing condition of affairs, and grant to municipalities directly the authority to exercise all powers of local self-government.--- Undoubtedly it was intended that on and after the time fixed in the

schedule for these amendments to go into effect, all municipalities of the state should stand alike, and alike receive their powers directly from the same source, and not that part should receive their powers from the General Assembly, and part from the Constitution itself."

Having expressed his disagreement with Justices Shauck and Wilkins, he goes on to base his concurrence with their conclusions on entirely different grounds. It has been noted that the Toledo ordinance was declared an emergency measure and put into effect immediately. This feature, Justice Donahue points out, brings the act into conflict with the state law of May 31st, 1911,⁽¹⁾ which requires that all acts involving the expenditure of money shall not go into effect for sixty days. For this reason, and because the ordinance does not show on its face that the appropriation is for a public purpose, "and for no other reason", he agrees with the majority in denying the application for mandamus.

Justice Wanamaker's Dissent.

The vigorous dissent of Justice Wanamaker opens with a lengthy defence of the theory that municipalities possess an inherent right of self-government, older than state institutions, and never relinquished by them to state or nation, but "taken from them by a process of legislative embezzlement".⁽²⁾ Then taking up the majority decision, he argues; - (a) that if section 3 depends upon the framing of a charter for its operation, the constitution would have so stated as in the case of the Home Rule provisions of California, Minnesota, Missouri, and Michigan: (b) that the "grievance to which this home rule amend-

(1) IO2 Ohio Laws 521.

(2) With few notable exceptions, the Ohio courts have consistently held the opposite view.

ment was directed was not so much to the form of government as to the substance of government", and any interpretation which makes all municipal power dependant upon a "paper writing" is inconsistent with this purpose; and (c) that the inclusion of certain limitations in section 13 upon municipal financial powers implies that the city possesses all other powers of local government. Expressio unius est exclusio alterius.

Judge Wanamaker then denies the main thesis of the majority decision, saying, "The amendment is automatically self-executing, the executive or administrative powers to be exercised by the usual executive or administrative officers, and the legislative powers to be exercised by the council which is made by statute the legislative body of municipalities. Throughout the convention and the campaign for the adoption of the constitutional amendment, it was universally claimed that the home rule amendment was automatically self-executing. What we know as men, we cannot unknow as judges. Construction of home rule must not lead to destruction of home rule. -- The majority opinion simply amends this whole section, makes it speak and mean what it never was intended to speak and mean, and is therefore simply judge-made constitution. -- Did the people who asked bread, get a brick, and that of the 'gold' variety, too, all under the label on the ballot, 'Municipal Home Rule'?"

To determine whether the moving picture business is a municipal function, Judge Wanamaker turns to the practice in foreign countries, the tendency in the United States, and judicial precedent in Ohio, (I) concluding from these that "at least in the first instance, a municipality has the right to determine that matter for itself, and should

(I) See *Goddin v Crump*, 8 Leigh 35 Va 120; *C.W.&M.R.Co. v Commissioners of Clinton Co.*, 1 O.S. 95.

not be interfered with in the exercise of its municipal power or its municipal government, unless the power sought to be exercised be so glaringly and palpably beyond the powers of local self-government that a court should say that the power was unauthorized and unconstitutional." In his opinion, then, "the exercise of such power on the part of the city council of Toledo was entirely lawful, fully authorized and ought not to be denied in a case of this character by this court".

The Purpose of the Framers of the Amendment.

The effect of the decision is to make the exercise of this broad grant of power dependent upon the framing of a charter as provided in article 18, or upon the passage of general or special laws determining its location and mode of exercise; and, in the absence of such charter or legislation, to deny to municipalities any power not granted by general laws. In other words, four members of the supreme court agreed that the city with a Home Rule charter was the only one which, at the time, could enjoy the grant of local self-government.

Was this the object of the framers of the Home Rule amendment, or was their purpose better expressed by the two justices who interpreted section 3 as giving this power to all cities regardless of further legislation? No positive answer is furnished by the convention debates on this section. On the 30th of April, Professor Knight first proposed the wording of section 3 which was ultimately adopted, "Municipalities shall have authority to exercise all powers of local
(I)
self-government--". "The object of my amendment", he said, "is to place all classes of municipalities, whether those which shall operate under general laws, or those which shall operate under additional

laws, under section 2, or those which operate under charters, that they shall all be under the same provisions. (1) Section 7 deals with those cities which choose to frame charters for themselves, while section 3 deals with the municipalities which choose to remain under general laws, and this puts both kinds of municipalities upon the same footing, so that those who shall operate under general laws shall have authority to exercise all powers of local self-government, and enact and enforce within their limits such police, sanitary, and other similar regulations as are not in conflict with general laws."

Mr. Harris, chairman of the committee on municipal government, was no less pronounced in his explanation of this measure, maintaining "that there is nothing in this proposal which means to give, or ever was intended to give, a charter-governed city any greater power or authority than a municipality organized and working under the general or special laws". (2) After a short debate in which section 3 as now worded by Professor Knight was repeatedly endorsed, and in which no exception was taken to the author's interpretation of its effect, the measure was accepted by the convention and passed on second reading by a vote of 104 to 6. (3)

It can be safely assumed, in view of these and similar statements, that the convention wished to confer the same powers upon cities adopting charters as upon those not doing so. The question remains as to whether the convention understood that such general or special laws must provide for the location and operation of the home rule power granted. In the lack of any clear indication of the convention's purpose, the interpretation of the court is more easily justified on the grounds of general legal theory. It is interesting to note that the convention debates were apparently not referred to by the counsel (1) Ibid, II, 1486. (2) Ibid, II, 1488. (3) Journal, p. 539.

on either side. This may be partially explained by the fact that the supreme court in previous cases had refused to give much weight to convention debates in the interpretation of constitutional provisions, referring to them in one instance as "proverbially unsafe guides".⁽¹⁾

Cleveland Charter Provisions Attacked.

The next opportunity of obtaining a judicial interpretation of the Home Rule amendment offered itself in connection with the new Cleveland charter adopted on July 1, 1913. By the terms of this charter, nomination by petition and non-partisan elections were substituted for the partisan primaries and elections required by the state law.⁽²⁾ In view of this conflict between state and municipal law, Secretary W.B. Gongwer of the Cuyahoga Board of Elections sought instructions from Secretary of State Graves, and was advised that so much of the city charter as provides for non-partisan elections is unconstitutional and must not be followed. Accordingly, the Cuyahoga election board refused to follow the city charter and continued its preparations under the state law. To prevent this, the city sought and was granted, an injunction in the common pleas court. The case then went to the supreme court, where the members divided, three to three on the question, the effect being to uphold the action of the lower tribunal.⁽³⁾ The attorney general's application for a rehearing

(1) Exchange Bank v Hines, 3 O.S. 1, 46. (1927)

In Lehman v McBride, 15 O.S. 573, 602 (1915) it was held that "Debates of constitutional conventions cannot change the fair import of language as the people must have understood it in ratifying the constitution".

See also Cass v Dillon, 2 O.S. 607, 621; (1926)

State ex rel v Foraker, 46 O.S. 677, 690-1. (189)

(2) Compare Cleveland Charter, sections 3-10 with General Code, section 4963.

(3) Fitzgerald et al Board of Deputy State Supervisors and Inspectors v City of Cleveland, 88 O.S. 306, August 26, 1913.

was denied. In effect, the Cleveland charter was upheld by the pro forma decision in the inferior court, and a constitutional interpretation of much importance to Ohio cities was established at least for the time being. Since this case was decided, a seventh member of the court has been appointed, so that the next case involving the same points will doubtless be decided in a way which will indicate more satisfactorily the status of Home Rule before the court.

In his argument in the case, Attorney General Hogan urged the superiority of state provisions over those of any division of the state, saying, "There is serious danger that the municipalities will become sovereign, and between the authority of the federal government on the one side, and municipal governments on the other, that state authority will be wiped out" (1)

As set forth in the plaintiff's brief, the specific contentions of the state were five-fold. (2) It was argued that;-

(a) The regulation of municipal elections is not included within the grant of "all powers of local self-government";

(b) The city cannot impose specific duties upon state officers, as Cleveland was attempting to do with respect to the board of elections;

(c) The subject matter of elections is of a general nature, and the city is made a mere subdivision of the state, answerable to it for the enforcement of the state's will. This position was supported by decisions from Michigan, Indiana, and Kentucky, in all of which states an inherent right of municipalities to self-government had been recognized by the courts, to the effect that local self-government does not imply freedom from state control over the method of conducting

(1) Ohio State Journal, Aug. 26th, 1913.

(2) Supreme Court of Ohio, number 14308.

elections for local officers.

(d)Conceding for the time that the grant of "all powers of local self-government does give power to regulate the methods of nominating and electing municipal officers,yet "such regulations would constitute an exercise of the police power;would amount to local police regulations within the meaning of article 18,section 3,of our constitution; and would therefore by its terms yield to the general law of the state when in conflict therewith." In support of this position, the syllabus of an Ohio decision was cited, to the effect that "The nomination of party candidates --- concerns the public welfare, and the Legislature in the exercise of the police power may make reasonable regulations thereof".⁽¹⁾

(e)The last contention,upon which the state finally based its entire case, was the unconstitutionality of the Cleveland charter under another section of the constitution. Article 5,section 7, provides that "All nominations for elective state,district,county and municipal offices shall be made at direct primary elections or by petition as provided by law". In the opinion of the Attorney General,"law" meant a state law providing that either a primary or petitions might be used.Therefore,he argued, the state or municipality can not prevent the use of either. "The executing legislation must provide for both methods of nomination, so that the Cleveland charter,having failed to provide for primary elections,is with respect to its nomination provisions, and for that reason alone,void."⁽²⁾

On behalf of Cleveland, it was argued that:-

(a)Provisions of a charter supersede general state law on all matters of local government;

(1)State v Felton,77 O.S. 554.(1905)

(2) Reply brief,pp.107-8.

(b)The power to frame charters and exercise all powers of local self-government includes the right to prescribe the methods to be followed in the nomination and election of municipal officers;

(c)These "powers" include not only proprietary or private powers but all local governmental powers;

(d)The action called in question is not an exercise of the police power;

(e)The charter does not conflict with article 5, section 7, of the constitution, because the charter is "law" in the sense used here.

The main issues before the court were;-

(a)Is the regulation of municipal elections a power of local self-government?

(b)What is the effect of a state election law passed under another clause of the constitution, to a provision of a local charter?

(c)Is the regulation of nominations and elections an exercise of the police power?

(a)"Powers" Defined.

Justice Johnson first defined "all powers of local self-government". He said, "the powers referred to are clearly such as involve the functions of government, and they are local in the sense that they relate to the municipal affairs of the particular municipality. It is clear upon reason and authority that municipal elections are , and should be regarded as, affairs relating to the municipality itself, and in the absence of fundamental limitations prohibiting, are things that may be provided for by the local government (1)

(1) Similar decisions in other states; See *People v Worswick*, 142 Cal. 71; *Socialist Party v Uhl*, 155 Cal. 776; *State v Portland*, 133 Pac. 62; *Mitchell v Carter*, 31 Ok. 592; and *Graham v Roberts*, 200 Mass. 152.

The very idea of local self-government, the generating spirit which caused the adoption of what was called the home rule amendment to the constitution, was the desire of the people to confer upon the cities of the state the authority to exercise this and other kindred powers without any outside interference.

"The inclusion of these limitations in article 18 (i.e. on taxing, borrowing, police, sanitary powers, etc.) is a conclusive indication that the convention which framed it was conscious of the wide scope of the powers which they were conferring upon the cities of the state with reference to their local self-government. Not alone this, but in connection with the comprehensive grant, they disclose the intention to confer on municipalities all other powers of local self-government which are not included in the limitations specified."

After noting that article 18 stipulates that elections provided for therein (acquiring of utilities, framing of charters, etc.) shall be conducted by the authorities prescribed by general law, Justice Johnson adds, "If the constitutional convention had intended that the election of all municipal officers should be conducted by the methods prescribed by general law, it is natural to suggest that so important an exception to the grant of all powers of local self-government would have been included in the article".

A Charter Supersedes State Law.

In regard to the second main point of issue, the court took the view held by the Missouri courts, and incorporated in the California constitution, that a municipal charter is paramount to general state laws on municipal affairs. Justice Johnson expressed the opinion that any election law passed under article 5, section 7, is a general law

and "must yield to a charter provision adopted by a municipality under a special constitutional provision, which special provision was adopted for the purpose of enabling the municipality to relieve itself of the operation of general statutes and adopt a method of its own to assist in its own self-government, and which charter when adopted has the force and effect of law. -- We have seen that the method of electing officers is a governmental function or power, and when the officer to be elected is to be chosen solely for the performance of a municipal duty, it is a municipal affair."

"The provisions of a charter which is passed within the limits of the constitutional grant of authority to the city is as much the law as a statute passed by the general assembly."⁽¹⁾

Under this interpretation, the Cleveland election provisions superseded the state election law, and no further consideration of article 5, section 7 was necessary. He, nevertheless, took up this provision. Conceding for the moment that this section applied to charter cities, it denied that the terms used required provisions for both primaries and petitions, and held that a charter which provides for such nomination by petition is a compliance with the requirement of that section. In other words, "as provided by law" was interpreted as meaning as provided by either state or municipal law, a view which had been held by the courts of other Home Rule states.⁽²⁾

Police Power Defined.

Justice Johnson then answered the contention of the state that the

⁽¹⁾ See similar opinions in other Home Rule states.

California; *Rothschild v Bantel*, 152 Cal. 5.

Oregon; *State ex rel Dunaway v Portland*, 133 Pac. 62.

Minnesota; *Grant v Berrisford*, 94 Minn. 45.

Missouri; *E.C. v Marsh Oil Co*, 140 Mo. 458.

⁽²⁾ See Justice Wanamaker's opinion.

regulation of elections constituted an exercise of the police power. He said, "the prescribing and defining of a system or method for the nomination and election of the officials of any city is only of interest and concern to the people within the limits of the city, and when governmental powers have been conferred upon the city, it acts within its authority when it adopts its own plan, provided it violates no constitutional requirement". Section 4963 of the general code "is simply a general statute of the state and could in no sense be held to supersede the provisions adopted by the city of Cleveland in its charter in compliance with the fundamental law".

After defining state police regulations as those involving the concern of the state for "the peace, health, and safety of all its people, wholly separate and distinct from, and without reference to, any of its political subdivisions", the court said, "We think it clear that the regulations referred to in section 3 are such, and such only, as we have indicated, and that it would be contrary to the import of the language and to the intent of the framers of the amendment to hold that by this clause there is denied to cities the authority to adopt charter provisions concerning the manifold subjects within the field of proper municipal activity, unless they are not 'in conflict with general laws' on the subjects proposed to be dealt with."

(1)

The contentions of the state were thus overthrown on every point. In concurring opinions, Justices Wanamaker and Wilkins reasserted the position taken by Justice Johnson, that the regulation of municipal elections is a function of local self-government not comprehended within the term, police power, and not subject to the limitation of state laws on the same subject.

(1) The second contention of the state's brief was not specifically referred to in this opinion.

Extent of Limitation of State Laws .

"If it be claimed", said Justice Wanamaker, "that not in conflict with general laws ,as found in the second half (article 18,section 3) modifies also the first half, then it must follow that all municipal-ities are as absolutely under the control and domination of the state legislature today as they were before the adoption of the home rule amendment. -- Home rule would be but an empty egg-shell, a mere snare and ideality." Justice Wilkins was hardly less emphatic on this point, and the dissenting opinion of Justice Donahue is apparently in agreement.

The effect of these opinions is to read into the section a comma between its two coordinate infinitive phrases. But the framers had defeated an attempt to insert a comma by a vote of 67 to 42, after it had been made clear that this addition would withdraw the limitation of state laws from the first part of the section. The only member of the convention who discussed this motion,said, "you see now that the purpose (of a motion to insert a comma) is to give the municipalities absolute power of local self-government without respect to any general laws of the state and that the limitation 'not in conflict with the general law of the state' shall apply only to local police,sanitary,and similar regulations. -- I think that the members in favor of this proposal should have known before this section was presented that those who are opposed to it yielded, as we did a few days ago, simply because we believed there was left in it local self-government for municipalities limited only by the provisions of the general assembly or the law-making power,"⁽¹⁾ The defeat of this motion leads to the belief that the convention shared his fear of

 (1)Debates,II,1862.

"unlimited municipal power", and wished to extend to "all powers of local self-government" the limitation of "general laws".

If such was the purpose of the framers, the supreme court effectively circumvented it and struck out the check on municipal power which the convention had attempted to place in this section. The purpose of the Home Rule grant, said Justice Wilkins, "was just as clearly to refer all powers of municipal government directly to the people of the cities themselves, free from the domination and manipulation of the state legislature and lobby. This power includes the control of the method of selecting the agents of the municipal government, for, if the legislature may prescribe to cities the choice of their municipal officers by the partisan primary method, the recent history of at least one city in Ohio shows that the boss of the dominant party in the city may not only control the city but the Legislature also".

Three Judges Dissent.

(I)

The dissenting opinion was written by Justice Donahue, with Justices Shauck and Newman concurring. "It is certainly clear," he said, "that the constitutional convention and the people of the states intended to give and did give, to municipalities full authority to exercise all powers of local self-government, but it is also clear that municipalities are subject equally with the state to any and all other provisions of the constitution affecting the exercise of constitutional powers". Avoiding further discussion of article 18, he based his dissent on an interpretation of article 5, section 7. This section applies "to every municipality in the state, and it is not the pro-

(I) It must be kept in mind that the justices divided evenly. In effect however, the three members who affirmed the lower court's decision constitute the "majority".

vince of a court to read into this amendment the words 'except in cities that have adopted a charter providing for other methods of nomination'. This is in fact what the opinions of the other judges had done, although as Justice Donahue pointed out, the issue was not made by the opposing counsel.

He then attacked the interpretation that electoral provisions were left to either state law or municipal act. "Law" is used often in the amendments, he said, and in every instance, it means a legislative act. "It would appear, therefore, that the phrase, 'as provided by law', means as provided by an act of the General Assembly of Ohio, and not as provided by the charter or ordinance of a municipality. Sections 4948 to 5015 of the General Code are still in force and govern the present case, their existence being recognized by the phrase 'as provided by law' !

The three dissenting justices thus based their denial of power to Cleveland not on the Home Rule article but upon another provision of the constitution which specifically regulated a single function of the municipality. With respect to article 18, no exception was taken by them to the interpretation of the court upholding a broad grant of municipal power of self-government, unlimited by state law except as to police, sanitary, and similar regulations. This agreement of the members of the supreme court is significant. It means that Home Rule in Ohio is not "an empty egg-shell, a mere snare and idealism," but a comprehensive power of self-government. Only two restrictions upon this power are pointed out by the individual members of the supreme court. The first is the superiority of general laws to local regulations of a specified nature; the second limitation is the operation of specific restrictions in other constitutional provisions. Although

the interests of Cleveland were sustained by the narrowest margin, the result was a decisive victory for Home Rule.

Summary of the Two Cases.

Leaving out of consideration the purely local considerations in these two cases, the adjudication on the Home Rule article may be summed up as follows.

It has been claimed by those who have attacked the validity of municipal activity under its provisions, that;-

(a) section 3 is not self-executing;

(b)"all powers of local self-government" include only local governmental functions;

(c)these powers are subject to the operation of general state law

In the Toledo case, four members of the court upheld the first contention, and declared the framing of a charter or further definitive legislation to be necessary before a municipality could exercise the powers granted. Two members took the opposite view, holding section 3 to be self-executing.

In the same case, three justices limited the scope of "powers of local self-government" to governmental functions, local and municipal; a fourth withheld his concurrence on this point; a fifth avoided a definition of this phrase but conceded that it might admit the function attempted by Toledo; and the sixth member of the court upheld the right of the municipality to determine within the field of its proper municipal power and government what functions shall constitute a public use.

With regard to third point, three justices, in the Cleveland case, restricted the limitation of state laws to police and sanitary regu-

lations, leaving other local powers unlimited, as regards article 18, except in financial matters as expressly provided. The three other (1) members indicated their agreement with this position.

The unanimity of the justices on the latter point makes it probable that the advent of a seventh member will not change its position in future litigation, but the definition of local governmental powers under this article cannot be regarded as settled, and future adjudication must develop the exact scope of this municipal power.

(1) See pp 104, 105, and N.E. Reporter, Sept. 30, 1913, p. 527.

Chapter VII.

Municipal Home Rule Charters .

Under article 18 of the Ohio constitution and the supplementary legislation of April, 1913, three courses of action are open to Ohio municipalities. (a) They may continue to operate under the municipal code of 1902 and its subsequent amendments, such legislation being held by the courts to remain in effect under article 18 until modified by the general assembly through general laws, or "additional laws" adopted by a municipality, or until superseded by the adoption of a local charter. (1) (b) They may, by a majority vote of the electors, adopt any of the three optional forms of government provided by the legislature, i.e. the commission plan, city manager plan, or the federal plan. (c) They may elect a charter commission and adopt the charter submitted by it.

In view of the dissatisfaction with the municipal code, and the general movement for wider power under Home Rule provisions, it is not to be expected that many cities will be satisfied with following the first course of action, unless the code is substantially amended by the legislature. Nor is it likely that the second mode of action will be chosen by any but the smaller municipalities. A model charter drawn up on rather stereotyped lines, for general application to a wide range of municipalities is rarely acceptable in its entirety to any one of them, although often serving as the basis for their own constructive work.

In the constitutional convention of 1912, the belief was expressed that few cities would frame charters for themselves if the legisla-

(1) State ex rel City of Toledo v Lynch, City Auditor, 88 O.S. 71 (1913)

ture were wise in providing adequate municipal legislation. Whether or not this condition has been satisfied, the charter activities of Ohio municipalities in the last eighteen months have been entirely along the third line. In no case has one of the forms of government proposed by the legislature been adopted, while in sixteen cities, charter commissions have been elected, thirteen cities have voted upon the charter submitted, and six have ratified the work of the commissions. This charter movement was doubtless strengthened by the interpretation of the Home Rule provisions made by the supreme court in Toledo (2) v Lynch. It was held in that case that the grant to municipalities of powers of local self-government (section 7) required further legislation to place it in effect, and that until the legislature should act, these powers could not be exercised except under a charter providing therefor.

A brief survey of this charter activity to the present time, an examination of specific charters representing the three types of government which have been acted upon, and some attention to the general trend of municipal government as evident in Ohio today, is the scope of this chapter.

A Survey of the Charter Activities.

A month after the Home Rule amendment went into effect, Cleveland took the first steps towards the framing of a new charter. The committee named by Mayor Baker in December, 1912, nominated a charter commission, and this was elected on February 4, 1913. On the 21st of May, it reported a plan of government, embracing the federal type of organization, with provisions for non-partisan elections, preferential

(1) Remarks of Mr. Harris, Debates; II, 1457.

(2) See supra, p. 90.

voting, the short ballot, initiative, referendum, and recall, adequate civil service regulation, and other features which will ^{be} further discussed. After a campaign of six weeks, in which the proposal was thoroughly discussed in the press and elsewhere, and in which the Civic League took an active part, the charter was adopted on July 1, (1) 1913. On the 1st of January, it went into effect. In the meantime however, other cities were following Cleveland's lead.

On July 15th, proposals embodying the commission plan of government were defeated in Salem and Canton, while on the same day a city manager charter was rejected in Elyria. The vote in the latter municipality ^{was} 957 to 801, the narrow defeat being due to an adverse vote in two election districts. One week later, Youngstown rejected the charter submitted by her commission, providing the city manager type, by the decisive vote of 5,984 to 2,973. The "Vindicator", a powerful Democratic paper of Youngstown, vigorously opposed the charter, and to this fact its defeat may be largely attributed, although objectionable features in the proposal were partly responsible. On the same day, Lakewood adopted a federal plan of organization. Middletown adopted commission government on August 9th, and four days later Dayton voted upon a new charter.

The attention of the Chamber of Commerce and other civic bodies of Dayton had early been attracted to the success of the city manager plan in operation in Sumter, S.C.. As a result of the growing sentiment in favor of the adoption of this plan for Dayton, a commission was elected on May 20th, whose members had pledged themselves to report a charter embodying such an organization. This was done, and on August 13th, the charter was accepted by a substantial majority. (2)

(1) Proposed Charter for the City of Cleveland, Prepared and Proposed by the Charter Commission.

(2) Approximate vote; For, 13,217; Against, 6,042.

Not a little of the credit for this is due the Dayton Bureau of Municipal Research. In a bulletin issued before the election of a charter commission, the government of the city was outlined, as also the three types of federal, commission, and city manager government, while arguments for and against each were presented in a concise and impartial manner. After the commission had reported, the Bureau published definite data and information as to the city's condition and needs, all of which made possible intelligent action by the enquiring
(1)
voter.

A city manager charter had been voted upon by Ironton on March 1st but with an adverse result, and little notice was given to its action elsewhere in the state. The next city to act was Norwalk, which rejected commission government on August 19th. The proposed plan had antagonized the newspapers by cutting down the amounts allowable for local advertising by the city, and had weakened its support from the old parties by non-partisan election provisions. Opposition also came from the public service corporations which feared the provision for popular ratification of all franchise grants. Akron also defeated commission government a week later, and on the same day, Springfield ratified a city manager charter by a majority of over three thousand votes.

For some months no charters were voted upon, but preparations were in progress in several cities. As early as May, 1913, Columbus had elected a charter commission. This did not report until March of the following year, and on May, 5th, 1914, the proposal was adopted by a narrow majority of a tight vote. Of a possible 40,000 votes, 8,514 were registered for, and 7,440 against the charter. It may be classed as a federal charter, although sharing some features of the other

(1) See "Shall We Change Our City Government" and "Government by Deficit"

types. Cincinnati and Sandusky chose commissions in the latter part of July, 1913, and reports may be expected in the near future. The Sandusky body is pledged to submit a city manager plan.

In one city, Marietta, the vote on the question of choosing a charter commission was unfavorable, and no further action has been taken.

To sum up what has been said of the charter activities to the present time, thirteen cities have voted upon new charters, all of which were locally framed. Two of the largest, Cleveland and Columbus, together with Lakewood, have adopted modified federal plans. Commission government has been adopted by Middletown, but defeated in Akron, Salem, Canton, and Norwood. The city manager organization has been accepted in Dayton and Springfield, but rejected in Youngstown, Ironton, and Elyria. The Sandusky commission is pledged to the same plan, while that of Cincinnati will probably report a scheme based upon the federal or the board plan.

The Federal Charters .

(a) Cleveland.

Soon after they had been placed in nomination, the members of the Cleveland charter commission issued a statement in which they expressed themselves in favor of the following;-(1)

- (a) effective initiative and referendum provisions,
- (b) the short ballot,
- (c) a non-political merit system,
- (d) submission of the question of the recall of elected officials,
- (e) a non-partisan ballot.

Five of the members also pledged themselves, before election, to favor a charter modeled on the federal plan and a council elected at large with not more than nine members. While the last feature was not

(1) The Municipal Bulletin, Feb. 1913, p. 3.

finally provided, the others were.

Under the new charter, the outstanding features of the Cleveland government are those of the federal type. (I)

(a) A council elected from wards. Two councillors are chosen from each of twenty-six wards, for a term of two years. Residence qualifications extends only to the city and not to the ward, with the exception that a member who resides in the ward which he represents at the time of election and later moves from it, shall forfeit his seat. The powers of the council extend to all legislative matters, investigations of other departments, election of its president and other employees.

(b) A mayor, upon whom responsibility for the administrative work of the city is centered. He is given power "to appoint and remove directors of all departments, and officers and the members of commissions not included within regular departments", and "to cause the affairs of any department or the conduct of any officer to be examined". Moreover, "The mayor and the directors of all departments established by this charter -- (are) entitled to seats in the council", with the power to take part in the discussion but not to vote, while the mayor can introduce ordinances and veto the same, subject to overruling by two-thirds of the council. He is elected for two years with a salary determined by the council.

(c) Administrative departments, under the control of single persons who are appointed by, and responsible to, the mayor. Six of these departments are provided, those of law, public service, public welfare, public safety, finance, and public utilities. All but one are subdivided into from three to five divisions, which are placed under

(I) Proposed Charter for the City of Cleveland.

commissioners appointed and removable by the director.

Other noteworthy features of the Cleveland government are;-

(d) A board of control, consisting of the mayor and heads of departments, whose function is to coordinate the administrative work of the city;

(e) Advisory boards, appointed by the director of any department with the approval of the mayor. This is a new introduction in American city government, and one which should result in much greater efficiency. The boards are composed of "citizens qualified to act in an advisory capacity to the commissioners of any division". They hold public meetings, submit written reports for entry on the records, but receive no remuneration.

(f) A civil service commission, of three members, appointed by the mayor, to prescribe and administer rules for the classified service. An effective means of enforcing its orders is given to the commission in the provision that no salaries or other compensation shall be paid in the classified service until the commission has certified upon the pay roll that such person is employed in accordance with the civil service provisions of the charter. Political activity in the service is also guarded against.

(g) Franchise provisions, which forbid exclusive grants to any public utility corporation, and reserve the city's right to regulate all such service, control the streets and public grounds, and terminate franchises.

(h) Financial regulations. The important department of finance is organized in the divisions of accounts, treasury, assessments and licenses, and purchases and supplies. Scientific accounting methods are provided, with adequate safeguards in the expenditure of the city's

money. The annual budget is prepared by the mayor from detailed and uniform reports from all the departments, and before the passage of the appropriation ordinance, provision must be made for public hearings, and publication of the measure in the City Record;

(i)The abolition of primaries. Nomination to all elective offices is by petition, of 2500 voters in the case of the mayor, and 200 in that of councilmen.

(j)Non-partisan ballot provisions, with arrangements for the indication of first, second, and third choices. This system is the Bucklin method of majority preferential voting, now used in Grand Junction, Spokane, Denver, Portland, and elsewhere. In case no candidate receives a majority of the first choices, the second choices are added, and if necessary the third choices, in which case, a mere plurality will elect.

(k)The initiative. Any ordinance submitted to the council by 5,000 electors must receive definite action by that body. If the measure is rejected or amended, the five persons named on the petitions as the official committee, may demand that it be submitted to the electorate either in its original form or with any changes proposed in an open meeting of the council committee to which it was referred. A majority vote adopts the ordinance.

(l)The referendum. Within forty days of passage, ordinances are subject to referendum on petition of 10 percent of the number of voters at the preceding regular municipal election. During this period, the ordinances do not go into effect, and if the proper petitions are filed, their operation is further suspended until the outcome of the referendum election. Such referendum takes place only if the council fails to repeal the measure. If submitted and not approved by a ma-

majority of those voting thereon, it is deemed repealed.

(m) A bureau of information and publicity, whose function it is to prepare reports and statistics, including the weekly City Record, and to take charge of all printing and editing of municipal documents.

(n) A city planning commission, "with power to control -- the design and location of works of art which are, or may become, the property of the city; the plan, design and location of public buildings, harbors, bridges, viaducts, street fixtures and other structures and appurtenances; the removal, relocation and alteration of any such works belonging to the city; the location, extension and platting of streets, parks and other public places, and of new areas ; and the preparation of plans for the future physical development and improvement of the city".

There should also be noted the provision for an eight hour day and forty-eight hour week on all public works of the city. Lastly, amendments to the charter are to be submitted to the electorate on a two-thirds vote of the council or a petition of ten percent of the voters, a mere majority of those voting thereon to be sufficient to ratify.

The Working of the Cleveland Charter.

The first opportunity of observing the operation of the new charter came in connection with the November elections for mayor and councilmen, in which the preferential features were first put into practice. In the mayoralty race, the count of all three choices was necessary to elect Newton D. Baker. The following table indicates the relatively small number of voters who expressed a second or third choice, and suggests the possibility that these choices if generally

expressed might elect the candidate who would stand third in an ordinary election where only one vote could be given.

Cleveland Municipal Elections, Nov. 4, 1913.

Candidate for Mayor	First Choice,	Second,	Third,	Total.
Baker, M.D.	41,296	3,554	1,554	46,404
Davis, H.L.	36,119	3,928	1,804	41,851
Robb, J.E.	5,768	9,247	2,593	17,608
Others	65			65
	<u>83,248</u>	<u>16,729</u>	<u>5,951</u>	<u>105,928</u>

In the election of councilmen, the count of three choices was necessary to elect in seventeen of the twenty-six wards. In two of the seventeen, the successful candidate was not the one who received the most first choices. The figures for these two wards are given.

Sixth Ward	First,	Second,,	Third,	Total	Majority.
Pfahl, D.	1317	271	97	1685	
Townes, C.C.	1312	289	101	1702	17
(Four other candidates)					

Twentieth					
Kohler, Fred,	1185	205	47	1437	
Woods, W.B.	1108	311	72	1491	54.
(Two other candidates)					

It will be noticed that although Kohler lead his nearest competitor by seventy-seven votes after the first choices had been counted, he was eventually defeated by fifty-four votes. It is probable however, that if Woods' supporters had all marked second and third choices, Kohler would have been elected, since these would hardly have been given entirely to the two lower candidates. It is plain then that under this method of voting, second and third choices may often play the determining role. For this reason, especial importance attaches to the consideration of the small number of such choices registered in these elections. Three reasons may be assigned for this. The novelty of the new voting system and ignorance of its operation

may have lead many voters to confine themselves to a single choice as under the old electoral provisions. Or a general apathy and possibly a feeling that only the first choice would be efficacious may have been responsible for these results. Finally, the action of the electors in avoiding an expression of any but first choices may have been deliberate and due to a desire to avoid helping another candidate, while profiting perchance by the lower choices of his supporters. To determine which of these causes operated in the Cleveland elections cited would require an intimate knowledge of conditions in the various wards, of the campaign, of party control, and of numerous other factors as to which no definite data exists. It is apparent that either the first or second cause suggested can be partially eliminated by education of the voters. The third offers a more serious problem. Since any candidate may increase his own chances at the second or third count, by instructing his partisans to vote only a first choice, it may easily happen that such a course of action will be followed by many or all of the candidates, with the result that a few scattering second or third choices may determine the outcome of the election. Such a condition would entirely defeat the purpose of the preferential system, and at the same time put a premium upon political organization and boss control.

The solution of the problem, with regard to the first two causes, ignorance and indolence, lies, as has been suggested, in education of the electorate to the realization that the most effective expression of its will under the preferential system, comes through a complete expression of choices. With regard to the third possible cause, the remedy seems to lie rather in the removal of the conditions which have made possible boss control and blind voting .

After three months experience with the operation of the new charter, the Cleveland Civic League issued a bulletin containing a critical survey of the situation. (I) No serious defects in the charter itself were found. But the narrow financial limitations imposed by state law had necessitated retrenchment wherever possible, which had taken the form in some cases of a temporary combination of divisions, as those of light and heat, while in others, divisions had been placed under a single commissioner, for example that of information and publicity formerly under the mayor and that of franchises under the director of public service. The board of control, the advisory boards and the civil service commission had all proved effective. Concerning another branch of the city government, the League's criticism was not so favorable. To quote from the Bulletin, "The attitude of the Council toward the new charter in its first three months of service is distinctly disappointing to those who have kept in touch with its work, and who, when the new charter took effect, had visions of a new animating spirit in the important work of determining the broad policies which are to govern the city. The Council has failed to grasp the meaning of the new charter and has refused to observe its spirit -- both of which are deserving of the severest public criticism."

The specific criticisms of the League are five-fold. The non-partisan principle has been openly violated in the organization of committees; the old antiquated system of committees has been retained in preference to one more nearly corresponding to the new administrative departments; records of votes have not been kept; the merit system has been violated by the council in the establishment of its own offices; and, most serious of all, there has been flagrant (I) The Municipal Bulletin, March, 1914.

violation of the emergency provision of the charter. This section provides that ordinances necessary for the "immediate preservation of the public peace, property, health or safety, or providing for the usual daily operation of a municipal department" may be passed as emergency measures without three readings, and to go into effect immediately. In the first three months under the charter, one hundred and twenty ordinances were passed by the council, of which forty-nine, or over one-third, were declared emergency measures. These include such ludicrous examples as "Ordinance 32015;- to authorize an expenditure not exceeding \$1,860 for the purchase of bathing suits", an "emergency" measure which was passed in the dead of winter, with the temperature at zero and Lake Erie a sheet of ice. Since the passage of measures under this provision serves to limit the possibility of public knowledge and hearing and the operation of the referendum, this abuse of power deserves the severe criticism which has been made.

It is significant, however, that no need of amendment of the charter is pointed out in the League's report. The generally satisfactory experience with its provisions, many of them departures in city government, will offer valuable suggestions for charter commissions in other municipalities.

(b) The Lakewood Charter.

The charter adopted by Lakewood, a municipality of (1) thousand inhabitants, has several features which deserve to be noted. In general it follows the Cleveland charter, adopting many of its provisions word for word, and providing the same type of organization. (1) Proposed Charter for the City of Lakewood, Ohio.

A striking difference is found in the first article. Instead of a long enumeration of the city's powers, which in the Cleveland document contains some six hundred words, the Lakewood charter has the following. "The City of Lakewood shall have all powers now or hereafter granted to municipalities by the constitution and laws of Ohio." The council provided in the charter also differs fundamentally from that of Cleveland. Instead of a large body chosen from wards, there is provided a small body of five members, elected at large. The charter commission evidently desired to incorporate non-partisan elections and preferential voting in their plan, but felt that this was forbidden by the state constitution. However one clause of the charter makes it obligatory upon the council to submit an amendment providing these features as soon as the "constitution or laws of the State" permit. The recall, which is found in practically every one of the other charters, is noticeable by its absence, although initiative and referendum provisions are both contained in this charter.

(c) The Columbus Charter.

The influence of the Cleveland charter is also seen in that of Columbus. Important differences are to be noticed, nevertheless. Primaries are retained, although with the non-partisan provisions. The principle of the short ballot has not been carried so far, since the auditor and city attorney, as well as the mayor and councilmen are elected, all but the latter under the same rules of preferential voting. A similarity to the Lakewood charter is seen in the council, a body of seven members, elected at large for four years, and partially renewed every two years. It chooses its president, a city clerk, the city treasurer, and a "public defender of indigent persons charged with crime." (I) Proposed Charter for the City of Columbus.

ed with offenses in the municipal courts".

While the Columbus mayor appoints the most important administrative officers, and has power to take part in the deliberations of the council, the object of establishing a strong executive is defeated to some extent by the objectionable provisions which make most of his appointments subject to the concurrence of the council (section 6I) and enable that body to override his veto by the same majority necessary to pass a measure in the first instance.

The six departments of the Cleveland administration are rearranged in three in the Columbus charter, namely, public safety, which includes public welfare, public service, including the division of utilities, and the department of health and sanitation.

Commission Government Charters.

Commission government in Ohio has been practically unknown, since the uniform code adopted in 1902 prevented the adoption of any plan, like the one then being worked out in Galveston, Texas. Since 1912, only one municipality, Middletown, has chosen this form of organization, although four others have voted upon it. A brief survey of the defeated Canton charter will indicate the distinctive features found in most of the charters of this type.

(a) The Canton Charter.

Five administrative departments are created, those of public affairs, finance, public works, public safety, and public properties. Each is placed under a director elected for the particular position, for four years, and with a salary of \$2500. Acting together, the five di-

(1) Proposed Charter, Prepared by the First Charter Commission of Canton.

(2) Such is the plan in the charter of Lynn, Mass., as distinguished from the Galveston and Des Moines charters where directors are not chosen for specific positions.

rectors constitute the city commission in which is vested "All powers, authority and rights, legislative, executive, administrative and judicial, now vested in, and exercised by, the City of Canton and its several officers, and all commissions and boards except the Board of Education, and all powers, authority and rights vested in, and exercised by, the City Council and the members thereof". The presidency of the commission is held by the director of public affairs. Each member is given power to appoint and remove, subject to the approval of a majority of the commission, all employees in his department and is held personally responsible for their work. The commission also appoints the city attorney, auditor, treasurer, clerk, and civil engineer, fixes their salaries and that of the judge of the criminal court, who is elective, and can create other offices.

Responsibility is thus centered upon five men, who control the city government, subject to civil service, initiative, referendum, and recall provisions. Non-partisan primaries and elections, free legal aid, and a department for garbage collection and disposal are all provided for in the defeated charter.

(b) Middletown Charter.

Under the charter adopted by Middletown, five commissioners are elected on a non-partisan ballot, at a salary of \$500. Other officers together with the health, park, and library boards are appointed by the commission. Initiative, referendum, and recall provisions are included, and civil service regulations for the police, fire, and sanitary departments.

Distinguishing features of the unsuccessful Norwood charter were the election of commissioners by preferential voting, and the require-

ment that no franchises be granted without a popular vote on the question.

The City Manager Charters.

One of the most interesting of the recent developments in municipal government is the city manager form of organization. ⁽¹⁾ First proposed in Lockport, N.Y., in December, 1910, it was not put into practice until June, 1912, when Sumter, S.C., adopted a charter embodying the Lockport idea. Staunton, Va. had previously experimented satisfactorily with a very similar plan, and the new form of government spread rapidly to other states. Dayton, with a population of 116,577, has been the first large city to adopt it, and for that reason, special interest attaches to its charter.

(2)

(a) The Dayton Charter.

Legislative powers are vested in a commission of five, elected at large for four years, with power to pass ordinances, adopt regulations investigate the financial transactions of any office or department and the official acts of any officer, and, most important, to appoint a city manager. That commissioner who polls the largest vote at the election where three members are chosen, is the mayor of the city. He presides over the meetings of the council and acts as the official head of the city for the purposes of executing military law, ceremonial functions and court processes. The salary of the commissioners is \$1,200, and the mayor receives an additional \$600.

The city manager "shall be the administrative head of the municipi-

(1) See "The City Manager Plan of Municipal Government", published by the National Short Ballot Organization.

(2) Proposed Charter for the City of Dayton.

pal government and shall be responsible for the efficient administration of all departments. He shall be appointed without regard to his political beliefs and may, or may not be, a resident of the City of Dayton when appointed. He shall hold office at the will of the commission and shall be subject to recall as herein provided". His powers and duties are outlined as follows;-

- (a) To see that the laws and ordinances are enforced;
- (b) To appoint and, except as herein provided, remove all directors of departments and all subordinate officers and employes in the departments in both the classified and unclassified service; all appointments to be upon merit and fitness alone, and in the classified service all appointments and removals to be subject to the civil service provisions of this charter;
- (c) To exercise control over all departments and divisions created herein or that may be hereafter created by the Commission;
- (d) To attend all meetings of the Commission with the right to take part in the discussion but without a vote;
- (e) To recommend to the commission for adoption such measures as he may deem necessary or expedient;
- (f) To keep the Commission fully advised as to the financial condition and needs of the city; and
- (g) To perform such other duties as may be prescribed by this charter or be required of him by ordinance or resolution of the Commission."

The city manager is also given the important power of investigating the affairs of any department or officer, and in doing this, he may issue subpoenas to compel the production of evidence, and punish witnesses for contempt.

Five administrative departments are provided in the Dayton charter, law, public service, public safety, public welfare, and finance. Especially comprehensive are the provisions for accounting, determination of cost of all municipal service, the safeguarding of expenditures, all assessments, and appropriation of property, franchise regulation, and the preparation of the budget and appropriation ordinances, the provisions in most cases being similar to those noted in the Cleveland charter.

In the first few months of the charter's operation, critics have pointed out several "defects". The application of the recall to the city manager is held to violate the theory of the controlled executive, who should be subject to the commission but to no other body. (1) Since the manager is in theory a non-political administrative expert, there seems to be no adequate reason why he should be placed in a position where he may be forced to come before the people for election after serving six months. The recall destroys that relation of exclusive control on the one hand and undivided responsibility on the other, which ought to exist between the commission and the manager.

Further criticism has been made by one who is in a position to observe closely the operation of the charter, of the provision which hinders the manager from discharging employes unless formal charges have been substantiated before the civil service board; and also of the section which permits him to make appointments from the entire list of eligibles rather than from possible the three highest names. (2) Further suggestions have been made for the abandonment of municipal primaries in favor of the simple declaration of the English system,

(1) Childs, The Theory of the New Controlled Executive Plan, National Municipal Review, January, 1913. The criticism mentioned, has been made by Prof. Herman G. James in the same magazine.

(2) Mr. L. D. Upson, Director of the Dayton Bureau of Municipal Research.

and for the substitution of a blanket provision for the long enumeration of municipal powers in the opening section.

Whether or not these criticisms are justified, the Dayton charter represents a distinct advance in the theory and the practice of American municipal government. Several fundamental principles may be noted;-

- (a) The separation of legislative and administrative functions, except in a few cases cited, as those of the mayor, and the right of the manager to sit in the council;
- (b) Concentration of responsibility, legislative in five councilors, administrative in a single officer;
- (c) Concentration of administrative power in one man, who in turn is controlled as regards general policy by a body responsible to the people;
- (d) The introduction into municipal government of expert administrators, chosen from a wide field, with prospects of adequate remuneration, permanent tenure, freedom from political interference, and opportunities for advancement to similar positions in other cities.
- (e) The introduction of scientific methods of business management in all branches of the city's work.

The choice made by Dayton and Springfield of a city manager bears out the point (d) above. After Colonel Goethals had declined the Dayton position, it was given to Mr. Henry M. Waite, a former city engineer of Cincinnati, at a salary of \$12,500. Mr. Charles E. Ashburner, the manager of Springfield, came to that city from Staunton, Va., where he had had experience in a similar position. Thus, even at this early period, the possibilities seem bright for the development of a

class of American bürgermeisters, who will make of business management a profession, which is both honored and well paid.

(b) Other City Manager Charters.

The Springfield charter, like that of Lakewood, contains no long statement of municipal powers. Instead is found this section. "It (I) (the City of Springfield) shall have and may exercise all powers which now or hereafter it would be competent for this charter specifically to enumerate, as fully and completely as though said powers were specifically enumerated herein; and no enumeration of particular powers by this charter shall be held to be exclusive." In this charter, the appointment of the solicitor, auditor, treasurer, and purchasing agent is given to the commission rather than to the manager as in the Dayton charter. a provision also found in the defeated Elgria plan.

In the charter rejected in Youngstown, (2) was the requirement that the city manager, or the "General Director", "shall have been a resident of the City of Youngstown for not less than five (5) years previous to his appointment". This was put in apparently for the purpose of overcoming local opposition to the charter on political grounds.

Such a limitation upon the choice of administrative experts should be condemned, not only because it narrows the field of choice, but because it encourages the entrance of politics into what should be a non-political office. The council proposed in the Youngstown charter was to consist of nine members, nominated from the nine wards but elected at large by preferential voting.

(1) Charter of the City of Springfield.

(2) Proposed Charter for the City of Youngstown.

General Charter Tendencies.

From the preceding review of the recent charter activities of Ohio municipalities, several conclusions may be drawn.

Perhaps the most noticeable feature is the wide dissimilarity in these new governments, evidenced not only in their embodiment of three distinct types of organization, but in the differing methods and organs of those cities which have adopted the same type. While a comprehensive study of the relative value of the three plans cannot be undertaken here, enough has been said to indicate certain distinct advantages in the city manager organization and to suggest that it offers the solution for the problem of the use and control of experts in municipal administration.

Differing widely in the governmental structure provided, these charters nevertheless reveal common tendencies. Their general trend is to encourage the average citizen to take an increased part in the policy determining work of the municipality, while restraining him from all but the slightest direct control of its administration. This is shown on the one side by provisions for a small legislative body, whose size tends to make more intimate its relation with the electorate; a system of election which permits a more complete expression of public opinion; requirements for public hearings on certain matters; the use of advisory boards or committees; the initiative and referendum of legislation; the recall of elected officers, the protest, and the ratification of franchise grants.

On the other hand, the removal of administrative affairs from di-

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- (1) Cleveland is an exception to the general rule.
 (2) Preferential voting in Cleveland, Youngstown, Columbus, and Norwood charters.
 (3) Cleveland and Dayton and Lakewood.
 (4) Cleveland, Springfield, Dayton. (5) Canton and Norwood.

rect control of the people is evidenced by the shortened ballot, on which at most only three administrative officers are placed, as a rule only one, and in several, not any; and by the provisions for civil service regulation, accounting, and "control from above", and the other safeguards which tend to remove the opportunity for illegitimate interference in administrative work; and by the limitation of the recall provisions.
(1)

But the administrative department has not been left independent and uncontrolled, a condition which might prove as unsatisfactory as has excessive political interference. Its responsibility is not to the people directly but through a hierarchy of departmental officials to a mayor or manager who in turn is responsible to the council, and through it to the electorate, or directly to the latter.

Whatever the exact machinery of administrative control, the common tendency in the charters noticed is towards unity of service, direct responsibility to a definite person or persons, and final concentration of responsibility in a body controlled by the municipality.

With these features should be mentioned the development of more scientific business methods, the result of a realization that the municipality as a business corporation should be operated on the same efficiency basis as any other corporation.

Not only do these charters give evidence of new machinery and methods for carrying on the old functions of municipal government, but they indicate a tendency to broaden out the field of the city's activity. This is shown in the importance placed on welfare, research, charity, and recreation work, and such new features as the public defender.

It is not surprising to find that the different charters have

(1) An exception in Layton has been noted.

applied different solutions to common problems of government. Disagreement still exists as to somewhat basis principles, as for example, the nature of the legislative body. On one side it is argued that the purely legislative body should be a small council elected at large so that government may be simple, responsibility centered, and the personnel of councilmen improved. Others insist on a large council, chosen from wards, in which representation will be "as immediate and as numerous as is consistent with a workable and not too cumbersome representative assembly".⁽¹⁾ The weaknesses in the latter view are suggested by the recent criticism of the Cleveland council. While the large council may better represent all sections, classes, and parties of the city better than the small body, this advantage is too often gained at a sacrifice of personal responsibility in the representatives chosen. Experience may show the advisability of a compromise between the two, taking the form, perhaps, of the council proposed in Youngstown, composed of nine members, nominated in wards, but elected at large.

Whatever the final solution, this disagreement between the charters is not to be decried. On the other hand, it is one of the valuable products of a Home Rule regime, making possible practical experimentation and exploration in the field of municipal government.

Another example may be taken to illustrate this point. The recall is still a "problem", one of whose perplexing features is the question of the proper relation of the officer sought to be recalled and the candidate seeking to replace him. California and Oregon have offered different solutions, both of which have objections. In the Ohio charters, three modes of conducting such an election are provided

(1) Mayo Fessler presents the arguments for the latter position in a pamphlet entitled, "A Home Rule Charter for Cleveland," originally read in 1912 before the Council of Sociology of Cleveland.

ed. In Cleveland, the officer against whom the recall is attempted appears on the ballot merely as a candidate to succeed himself, no question of his recall being voted upon. In Dayton, the two questions of recall and of election of a successor are voted upon separately, but upon the same ballot. Perhaps the best plan, at least for municipalities, is that provided in the Columbus, Springfield, Canton, and the defeated Youngstown charters. In these, the first ballot presents only the question of recall, and if the vote is affirmative, the successor is chosen at a subsequent election. An exception is made where the recall is attempted of more than three councilmen in Columbus, or two in Canton and Springfield, in which cases the successors are voted upon on the first ballot, as in the California plan. The Youngstown charter went even farther, requiring two elections unless all the councilmen were petitioned against. The chief argument for the last named method is that it tends to place the recall proposition solely on its own merits, instead of confusing it with extraneous considerations. On the other side, the extra election increases expense, imposes another duty upon a too often indifferent electorate, and interrupts to a greater extent the work of the office involved. Whatever may be proved by experience to be the better method, it is enough to suggest that the operation of the recall under these varying charter provisions may furnish data of great value in determining the final solution of the question.

Home Rule in Ohio is of too recent a birth to permit a definite estimate of its effect upon the character of municipal life of the state. In the first flush of accomplished reform, better results are often produced than in a later period, and it remains to be seen whether a permanent increase in civic responsibility will result.

Since the basic element of good government is the character of the citizenship, not that of the charter, it cannot be expected that Home Rule will automatically produce efficiency in municipal government. But since the most exemplary citizenship can only with difficulty establish efficiency in a government whose charter and powers are controlled by a foreign body, usually uninformed and often hostile, it may be said that Home Rule, by placing the authority and the responsibility upon the local community, has taken a long step towards the solution of the problem of municipal good government.

At the end of this discussion, the question may arise, If Home Rule is a good thing, why not make it complete, why limit municipal power by state control in the matter of police, sanitary, financial, and other similar functions? The answer lies in the dual character of the municipal corporation. Acting as an organization for purely local government, it also exercises important powers as an agent of the state. In the latter capacity, its operation affects a large area and population, and state control therefore becomes necessary in the interests of administrative uniformity and efficiency.

The problem in Ohio, as elsewhere, has been to properly balance this state control with due municipal independence, and to guarantee local autonomy while safe-guarding the wider interests of the state. The accomplishment of this end has been the purpose, and, it is hoped, will be the result of the establishment of Municipal Home Rule.

Finis.

Appendix A .

Ohio Constitution, Article XVIII. Municipal Corporations.

Sec.1. Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law.

Sec.2. General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law.

Sec.3. Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

Sec.4. Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

Sec.5. Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall

take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance, it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of section 8 of this article as to the submission of the question of choosing a charter commission.

Sec.6. Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty per centum of the total service or product supplied by such utility within the municipality.

Sec.7. Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

Sec.8. The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the submission to the electors, of the question, "Shall a commission be chosen to frame a charter." The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a

special election to be called and held within the time aforesaid. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question shall have voted in the affirmative. Any charter so framed shall be submitted to the electors of the municipality at an election to be held at a time fixed by the charter commission and within one year from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. Not less than thirty days prior to such election the clerk of the municipality shall mail a copy of the proposed charter to each elector whose name appears upon the poll or registration books of the last regular or general election held therein. If such proposed charter is approved by a majority of the electors voting thereon it shall become the charter of such municipality at the time fixed therein.

Sec. 9. Amendments to any charter framed and adopted as herein provided may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority, and, upon petitions signed by ten percentum of the electors of the municipality setting forth any such proposed amendment, shall be submitted by such legislative authority. The submission of proposed amendments to the electors shall be governed by the requirements of section 8 as to the submission of the question of choosing a charter commission, and copies of proposed amendments shall be mailed to the electors as hereinbefore for copies of a proposed charter. If any such amendment is approved by a majority of the electors voting thereon, it shall become a part of the charter of the municipality. A copy of said charter or any amendment thereto

shall be certified to the Secretary of State, within thirty days after adoption by a referendum vote.

Sec.10. A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law.

Sec.11. Any municipality appropriating private property for a public improvement may provide money therefor in part by assessments upon benefited property not in excess of the special benefits conferred upon such property by the improvements. Said assessments, however, upon all the abutting, adjacent, and other property in the district benefited shall in no case be levied for more than fifty per centum of the cost of such appropriation.

Sec.12. Any municipality which acquires, constructs or extends any public utility and desires to raise money for such purposes may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law; provided that such mortgage bonds issued beyond the general limit of bonded indebtedness prescribed by law shall not impose any liability upon such municipality but shall be secured only upon the property and revenues of such public utility, including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case ex-

tend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure.

Sec.I3. Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities.

Sec.I4. All elections and submissions of questions provided for in this article shall be conducted by the election authorities prescribed by general law. The percentage of electors required to sign any petition provided for herein shall be based upon the total vote cast at the last preceding general municipal election.

Schedule.

If the foregoing amendment to the constitution be adopted by the electors and become a part of the constitution, it shall take effect on November 15, 1912.

(Election Sept. 3, 1912. Votes; Yes, 301, 861; No; 215, 120.)





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